42 U.S.C. § 2000bb(b). The majority uses this statutory text to conclude that the purpose of RFRA was to "restore" a de facto "substantial burden" test supposedly employed in *Sherbert* and *Yoder*. In the hands of the majority, that test is extremely restrictive, allowing a finding of "substantial burden" only in those cases where the burden is imposed by the same mechanisms as in those two cases. In the majority's words, "Where . . . there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no 'substantial burden' on the exercise of their religion." Maj. op. at 10042.

For six reasons, the majority is wrong in looking to *Sherbert* and *Yoder* for an exhaustive definition of what constitutes a "substantial burden." First, the majority's approach is inconsistent with the plain meaning of the phrase "substantial burden." Second, RFRA does not incorporate any pre-RFRA definition of "substantial burden." Third, even if RFRA did incorporate a pre-RFRA definition of "substantial burden," *Sherbert*, *Yoder*, and other pre-RFRA Supreme Court cases did not use the term in the restrictive manner employed by the majority. That is, the cases on which the majority relies did not state that interferences with the exercise of religion constituted a "substantial burden" only when imposed through the two mechanisms used in *Sherbert* and *Yoder*. Fourth, the purpose of RFRA was to expand rather than to contract protection for the exercise of religion. If a disruption of religious practices can qualify as a "substantial burden" under RFRA only when it is imposed by the same mechanisms as in *Sherbert* and *Yoder*, RFRA would permit interferences with religion that

it was surely intended to prevent. Fifth, the majority's approach overrules fourteen years of contrary circuit precedent. Sixth, the majority's approach is inconsistent with our cases applying RLUIPA. The Supreme Court has instructed us that RLUIPA employs the same analytic framework and standard as RFRA. I consider these reasons in turn.

a. Substantial Burden on the Exercise of Religion

The majority contends that the phrase "substantial burden" refers only to burdens that are created by two mechanisms — the imposition of a penalty, or the denial of a government benefit. But the phrase "substantial burden" has a plain and ordinary meaning that does not depend on the presence of a penalty or deprivation of benefit. A "burden" is "[s]omething that hinders or oppresses." Black's Law Dictionary (8th ed. 2004). A burden is "substantial" if it is "[c]onsiderable in importance, value, degree, amount, or extent." American Heritage Dictionary (4th ed. 2000). In RFRA, the phrase "substantial burden" modifies the phrase "exercise of religion." Thus, RFRA prohibits government action that "hinders or oppresses" the exercise of religion "to a considerable degree." *See also San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (using dictionary definitions to define "substantial burden" under RLUIPA and concluding that "for a land use regulation to impose a 'substantial burden' it must be 'oppressive' to a 'significantly great' extent.").

The text of RFRA does not describe a particular *mechanism* by which religion cannot be burdened. Rather, RFRA prohibits government action with a particular *effect* on religious exercise. This prohibition is categorical: "Government shall not substantially burden a person's exercise of religion . . . ." 42

U.S.C. § 2000bb-1(a). Had Congress wished to establish the standard employed by the majority, it could easily have stated that "Government shall not, *through the imposition of a penalty or denial of a benefit*, substantially burden a person's exercise of religion . . . ." It did not do so. The majority is correct that such text would have been unnecessary if RFRA had incorporated previous Supreme Court case law that defined the phrase "substantial burden" as a term of art referring only to the imposition of a penalty or denial of a benefit. Maj. op. at 10061-62. However, as explained below, Congress did not "restore" any technical definition of "substantial burden" found in pre-RFRA case law, let alone "restore" the definition the majority now reads into RFRA.

b. "Restoring" *Sherbert* and *Yoder*

The text of RFRA explicitly states that the purpose of the statute is "to restore the *compelling interest test* as set forth in [*Sherbert* and *Yoder*]." 42 U.S.C. § 2000bb(b) (emphasis added). The text refers separately to "substantially burden" and the "exercise of religion," but it says nothing about "restoring" the definition of these terms as used in *Sherbert* and *Yoder*.

In the years after *Sherbert* and *Yoder*, the Supreme Court applied the "compelling interest test" to fewer and fewer Free Exercise claims under the First Amendment. For example, in *Goldman*, 475 U.S. at 505, 507-08, the Court conceded that a military regulation banning civilian "headgear" implicated the First Amendment rights of an Orthodox Jew who sought to wear a yarmulke, but then upheld the regulation after minimal scrutiny due to the "great deference [owed] the professional judgment of military authorities concerning the relative importance of a particular military interest." In *O'Lone*, 482 U.S. at 349,

the Court refused to require that prison regulations be justified by a compelling interest, instead demanding only that they be "reasonably related to legitimate penological interests." *See also Bowen v. Roy*, 476 U.S. 693, 707 (1986) (Burger, J., for plurality) (compelling interest test not applicable in enforcing "facially neutral and uniformly applicable requirement for the administration of welfare programs"); *Lyng*, 485 U.S. at 454 (compelling interest test not applicable where government interferes with religious exercise through "the use of its own land").

In other cases, the Court purported to apply the compelling interest test, but in fact applied a watered-down version of the scrutiny employed in *Sherbert* and *Yoder*. Rather than demanding, as it had in *Sherbert* and *Yoder*, that the particular governmental interest at stake be compelling, the Court accepted extremely general definitions of the government's interest. For example, in *United States v. Lee*, 455 U.S. 252 (1982), the Court balanced an individual's interest in a religious exemption from social security taxes against the "broad public interest in maintaining a sound tax system." *Id.* at 260. Likewise, the plurality in *Roy* balanced an individual's objection to the provision of a social security number against the government's general interest in "preventing fraud in [government] benefits programs." 476 U.S. at 709; *see also* David B. Tillotson, *Free Exercise in the 1980s: A Rollback of Protections*, 24 U.S.F. L. Rev. 505, 520 (1990) ("The Court has either defined the Government's interest so broadly that no individual's interest could possibly outweigh it or, more recently, has . . . simply refused to weigh individual challenges to uniformly applicable and neutral statutes against any government interest, notwithstanding *Sherbert*.").

Smith, in which the Court refused to apply the compelling governmental interest test to a generally applicable law burdening the exercise of religion, was the last straw. In direct response, Congress enacted RFRA, directing the federal courts to "restore" the "compelling interest test" that had been applied in *Sherbert* and *Yoder* "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). That is, by restoring the "compelling interest test," Congress restored the application of strict scrutiny, as applied in *Sherbert* and *Yoder*, to all government actions substantially burdening religion, and rejected the restrictive approach to free exercise claims taken in *Lyng*, *Roy*, *Goldman*, *O'Lone*, and *Lee*. But this directive does not specify what government actions substantially burden religion, thereby triggering the compelling interest test. RFRA did not "restore" any definition of "substantial burden." Because Congress did not define "substantial burden," either directly or by reference to pre-*Smith* case law, we should define (and in fact have defined) that term according to its ordinary meaning.

c. "Substantial Burden" Test Not Used in *Sherbert*, *Yoder*, and Other Pre-RFRA Cases To Rule Out Certain Burdens

According to the majority, pre-RFRA cases used the term "burden" or "substantial burden" to refer exclusively to burdens on religion imposed by only two particular types of government action. According to the majority, a "substantial burden" under RFRA can only be caused by government action that either "coerce[s an individual] to act contrary to their religious beliefs under threat of sanctions, or condition[s] a governmental benefit upon conduct that would violate [an individual's] religious beliefs." Maj. op. at 10042. This

restrictive definition of "substantial burden" cannot be found in *Sherbert*, *Yoder*, or any other case prior to the passage of RFRA.

In *Sherbert*, 374 U.S. 398, the Court held that a Seventh-day Adventist could not be denied unemployment benefits based on her refusal to work on Saturdays. Without using the phrase "substantial burden," the Court concluded that a requirement that the plaintiff work on Saturdays, on pain of being fired if she refused, "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. The Court compared such an imposition to a governmental fine: "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* The Court therefore mandated that the requirement be justified by a "compelling state interest." *Id.* at 406-09.

In *Yoder*, 406 U.S. 205, the Court held that Amish children could not be required to attend school up to the age of sixteen, on penalty of criminal sanctions against their parents if they did not attend. Without using the phrase "substantial burden," the Court concluded that a requirement that children attend school, on pain of criminal punishment of their parents if they did not, "would gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* at 219. The Court therefore required, as it had in *Sherbert*, that the requirement be justified by a "compelling state interest." *Id.* at 221-29.

Neither *Sherbert* nor *Yoder* used the majority's substantial burden test as the trigger for the applica-

tion of the compelling interest test. The Court in *Sherbert* and *Yoder* used the word "burden," but nowhere defined, or even used, the phrase "substantial burden." After holding that the exercise of religion was burdened in each case, the Court simply did not opine on what other impositions on free exercise would, or would not, constitute a burden. That is, *Sherbert* and *Yoder* held that certain interferences with religious exercise trigger the compelling interest test. But neither case suggested that religious exercise can be "burdened," or "substantially burdened," *only* by the two types of interference considered in those cases. The phrase "substantial burden" is a creation of later cases which sometimes use *Sherbert* or *Yoder* as part of a string citation. *See, e.g., Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989). Neither *Sherbert* nor *Yoder*, nor any of the later cases, uses the restrictive definition of "substantial burden" invented by the majority today.

Nor do other pre-RFRA cases supply the majority's restrictive definition of "substantial burden." The majority relies heavily on *Lyng*, 485 U.S. 439, which relies in turn on *Roy*, 476 U.S. 693. In *Lyng*, tribal members challenged the construction of a proposed road on government land in the Chimney Rock area of the Six Rivers National Forest as infringing their rights under the Free Exercise Clause of the First Amendment. 485 U.S. at 442-42. The Court began its analysis by reiterating the holding of *Roy* that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 485 U.S. at 448 (quoting *Roy*, 476 U.S. at 699-700). The Court then reasoned:

> In both [*Lyng* and *Roy*], the challenged Government action would *interfere significantly* with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be *coerced* by the Government's action into violating their religious beliefs; nor would either governmental action *penalize* religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.

Id. at 449 (emphases added). The Court concluded that only "coercion" of the sort found in *Sherbert* and *Yoder* would trigger strict scrutiny because, "[t]he crucial word in the constitutional text is 'prohibit.'" *Id.* at 451.

Justice Brennan dissented from the majority's refusal to apply heightened scrutiny, emphasizing that the First Amendment "is directed against any form of governmental action that frustrates or inhibits religious practice." *Id.* at 459 (Brennan J., dissenting). In response, the *Lyng* majority conceded that the proposed road would have "severe adverse effects on the practice of [plaintiffs'] religion." *Id.* at 447. But the Court went out of its way to reject Justice Brennan's contention that the First Amendment is directed at governmental action that frustrates or inhibits religious practice. It responded, "The Constitution . . . says no such thing. Rather, it states: 'Congress shall make no law . . . *prohibiting* the free exercise [of religion].'" *Id.* at 456-57 (quoting *id.* at 459; U.S. Const. amend. I) (emphasis and alterations in original).

Lyng did not hold that the road at issue would cause no "substantial burden" on religious exercise. The Court in *Lyng* never used the phrase "substan-

tial burden." Rather, *Lyng* held that government action that did not coerce religious practices or attach a penalty to religious belief was insufficient to trigger the compelling interest test *despite* the presence of a significant burden on religion. The Court explicitly recognized this in *Smith* when it wrote, "In [*Lyng*], we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities '*could have devastating effects on traditional Indian religious practices*.'" *Smith*, 494 U.S. at 883 (quoting *Lyng*, 485 U.S. at 451) (emphasis added).

The majority's attempt to read *Lyng* into RFRA is not just flawed. It is perverse. In refusing to apply the compelling interest test to the "severe adverse effects on the practice of [plaintiffs'] religion" in *Lyng*, the Court reasoned that the protections of the First Amendment "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." 485 U.S. at 447, 451. The Court directly incorporated this reasoning into *Smith*. *See* 494 U.S. at 885. Congress then rejected this very reasoning when it restored the application of strict scrutiny "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b).

In sum, it is clear that the interferences with the free exercise of religion that existed in *Sherbert* and *Yoder* qualify, to use the terminology of RFRA, as a "substantial burden." But the text, purpose, and enactment history of RFRA make equally clear that RFRA protects against burdens that, while imposed

by a different mechanism than those in *Sherbert* and *Yoder*, are also "substantial."

d. Purpose of RFRA

The express purpose of RFRA was to reject the restrictive approach to the Free Exercise Clause that culminated in *Smith* and to restore the application of strict judicial scrutiny "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). The majority's approach is fundamentally at odds with this purpose.

As should be clear, RFRA creates a legally protected interest in *the exercise of religion*. The protected interest in *Sherbert* was the right to take religious rest on Saturday, not the right to receive unemployment insurance. The protected interest in *Yoder* was the right to avoid secular indoctrination, not, as the majority contends, the right to avoid criminal punishment. See Maj. Op. at 10054-55 n.12.

Such interests in religious exercise can be severely burdened by government actions that do not deny a benefit or impose a penalty. For example, a court would surely hold that the government had imposed a "substantial burden" on the "exercise of religion" if it purchased by eminent domain every Catholic church in the country. Similarly, a court would surely hold that the Forest Service had imposed a "substantial burden" on the Indians' "exercise of religion" if it paved over the entirety of the San Francisco Peaks. We have already held that prison officials substantially burden religious exercise if they record the confessions of Catholic inmates, or refuse to provide Halal meat meals to a Muslim prisoner. *See Mockaitis v. Harcleroad*, 104 F.3d 1522, 1531 (9th Cir. 1997) ("A substantial burden is imposed on . . . free exercise of

religion . . . by the intrusion into the Sacrament of Penance by officials of the state."); *Shakur v. Schriro*, 514 F.3d 878, 888-89 (9th Cir. 2008) (holding that failure of prison officials to provide Muslim prisoner with Halal or Kosher meat diet could constitute substantial burden on religious exercise under RLUIPA); *see also Lovelace v. Lee*, 472 F.3d 174, 198-99 (4th Cir. 2006) (holding that prisoner's right to religious diet under RLUIPA is clearly established for purposes of qualified immunity).

However, the majority's restrictive definition of "substantial burden" places such injuries entirely outside the coverage of RFRA because they are imposed through different mechanisms than those employed in *Sherbert* and *Yoder*. The majority cannot plausibly justify this result by arguing that the complete destruction of a religious shrine or place of worship, violation of a sacrament, or denial of a religious diet are less "substantial" restrictions on religious exercise than those caused by the denial of unemployment benefits. Rather, the majority refuses to apply strict scrutiny to these substantial injuries because, in its view, "a government that presides over a nation with as many religions as the United States of America [could not] function were it required to do so." *See* Maj. op. at 10042.

This proposition was explicitly rejected by RFRA, which directs courts to apply the compelling governmental interest test "in all cases" where there is a "substantial burden" on the "exercise of religion." *See* RFRA § 2000bb(a)(5) (stating that "the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interests"). It has also been explicitly rejected by the Supreme Court. *See Gonzales*

v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430 (2006) (rejecting the government's argument that the Controlled Substances Act "cannot function . . . if subjected to judicial exemptions" because "RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach"); *id.* at 1215 ("Here the Government's uniformity argument rests not so much on the particular statutory program at issue as on slippery slope concerns that could be invoked in response to any RFRA claim . . ."). The majority's approach thus places beyond judicial scrutiny many burdens on religious exercise that RFRA was intended to prevent, and does so based on "slippery slope" arguments that the Supreme Court has instructed us to reject.

e. This Circuit's RFRA Precedents

As I have described above, the majority's narrow definition of "substantial burden" conflicts with RFRA's text and purpose. The majority's approach also conflicts with our prior application of RFRA in this circuit.

We first addressed the definition of "substantial burden" under RFRA in *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995). We stated that a "substantial burden" exists where:

> [A] governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in [religious] conduct *or having a religious experience* . . . . This interference must be more than an inconvenience; the burden must be substantial.

Id. at 949 (*quoting Graham v. C.I.R.*, 822 F.2d 844, 850-51 (9th Cir. 1987)) (second, third, and fifth al-

terations in *Bryant*) (emphasis added). Since *Bryant*, we have repeatedly refused to adopt the conclusion of the majority that "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." Maj. op. at 10053. *See, e.g.*, *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (substantial burden where government "prevent[s] [plaintiff] from engaging in [religious] conduct or having a religious experience" and is "more than an inconvenience") (quoting *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996); and *Bryant*, 46 F.3d at 949); *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (same). We have noted that "[a] statute burdens the free exercise of religion if it 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,' *including* when, if enforced, it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'" *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002) (emphasis added) (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981); *and Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)). However, nothing in our opinions suggests that the government can substantially burden religion *only* by applying a penalty or withholding a benefit based on religion.

In fact, we have held precisely the opposite. In *Mockaitis*, a district attorney for Lane County, Oregon, with the assistance of officials at the Lane County Jail, recorded the confession of a detained murder suspect to a Catholic priest. 104 F.3d at 1524-26. The prisoner and the priest learned of the taping only af-

ter it occurred. *Id.* at 1526. Although the prisoner did not seek suppression of the tape, the priest, together with the Archbishop of Portland, sought an injunction under RFRA barring future taping. *Id.* at 1526-1527. We concluded the initial taping violated RFRA and held that an injunction was warranted because,

> A *substantial burden* is imposed on [the Archbishop's] free exercise of religion as the responsible head of the archdiocese of Portland by the intrusion into the Sacrament of Penance by officials of the state, an intrusion defended in this case by an assistant attorney-general of the state as not contrary to any law. Archbishop George has justifiable grounds for fearing that without a declaratory judgment and an injunction in this case the administration of the Sacrament of Penance for which he is responsible in his archdiocese will be made odious in jails by the intrusion of law enforcement officers.

Id. at 1531 (emphasis added). *Mockaitis* was not only correctly decided. It is also flatly inconsistent with the majority opinion.

The majority does not dispute that *Mockaitis* is inconsistent with its approach today, but instead argues that *Mockaitis* "cannot serve as precedent" for two reasons. Maj. op. at 10060-61 n.15. First, the Majority notes that *City of Boerne*, 521 U.S. at 532, overruled our application of RFRA to a state subdivision in *Mockaitis*. But the federalism holding of *City of Boerne*, 521 U.S. at 532, was entirely unrelated to our definition of "substantial burden." We do not normally discard our prior view of the law simply because it was expressed in a case that is overruled on unrelated grounds. To the contrary, this circuit has cited cases that have been "overruled on other grounds" in

1,508 opinions. *Mockaitis* continues to demonstrate that we have previously refused to adopt the majority's restrictive definition of "substantial burden."

Second, the majority finds *Mockaitis* "unhelpful" because it "did not define substantial burden, let alone analyze the substantial burden standard under the *Sherbert/Yoder* framework restored in RFRA, [or] attempt to explain why such framework should not apply to define substantial burden." Maj. op. at 10061 n.15. As I have explained above, RFRA did not employ the term "substantial burden" as a term of art limiting the application of RFRA to burdens caused by the precise mechanisms at issue in *Sherbert* and *Yoder*. In rejecting this argument, the majority dismisses *Mockaitis* precisely because it proves my point. That is, because *Mockaitis* does not treat "substantial burden" as a term of art limited to burdens caused by the precise mechanisms at issue in *Sherbert* and *Yoder*, the majority must perforce reject it. The conflict between *Mocktaitis* and the majority's approach today reflects the novelty of today's opinion, not any shortcomings of *Mocakaitis*.

Notably absent from the majority's opinion is any explanation of why the result reached in *Mockaitis* is incorrect. Under the majority's approach, it is clear that governmental eavesdropping on a prisoner's confession to his priest would not impose a substantial burden on the prisoner or priest under RFRA. This cannot be the law.

f. This Circuit's RLUIPA Precedents

Our cases interpreting the definition of "substantial burden" under RLUIPA have applied a similar definition to the definition employed in *Bryant*, 46 F.3d at 949. In applying RLUIPA, we have stated

that "for a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005) (quoting *San Jose Christian College*, 360 F.3d at 1034). In other words, we have defined "substantial burden" according to the *effect* of a government action on religious exercise rather than particular mechanisms by which this effect is achieved.

Moreover, we recently held that a substantial burden could exist under RLUIPA in a case that involved no imposition of a penalty or deprivation of a benefit. In *Shakur*, 514 F.3d 878, a Muslim inmate brought a RLUIPA challenge alleging that the Arizona Department of Corrections substantially burdened his exercise of religion by refusing to provide him with a Halal or Kosher meat diet. *Id.* at 888-89. The imposition on Shakur was in fact relatively mild because the prison provided him with a vegetarian diet as an alternative to the ordinary meat diet. *Id.* at 888, 891. Nonetheless, we found that Shakur had asserted a cognizable substantial burden under RLUIPA when he alleged that the vegetarian diet he was forced to eat for lack of Halal meat gave him indigestion, thereby disrupting his religious practices. *Id.* at 888. Because the Arizona Department of Corrections had not imposed any penalty or withheld any benefit from Shakur based on his exercise of religion, *Shakur* is, like *Mockaitis*, flatly inconsistent with the majority opinion.

In attempting to distinguish *Shakur*, the majority again refuses to accept the implications of its own rule. The majority claims that *Shakur* is a "straight-

forward application of the *Sherbert* test" because "the policy conditioned a governmental benefit to which Shakur was otherwise entitled—a meal in prison—upon conduct that would violate Shakur's religious beliefs." Maj. op. at 10068 n.24. However, like *Mockaitis, Shakur* applied the ordinary meaning of the phrase "substantial burden," which is inconsistent with the majority's newly minted "*Sherbert* test." In *Sherbert*, a Seventh-day Adventist was denied unemployment benefits after she was fired for refusing to work on Saturdays because, according to the state, she had "fail[ed], without good cause, to accept suitable work when offered." 374 U.S. at 399-400 (internal quotation marks omitted). In other words, the plaintiff in *Sherbert* was denied a government benefit, to which she was otherwise entitled, because of her religious observance.

Contrary to the majority's assertions, the inmate in *Shakur* was not denied any government benefit to which he was otherwise entitled because of his religious observance. Shakur had a legal interest in *some* meal in prison, but he was never denied this interest as a consequence of his religious observance. Eating the vegetarian meals provided by the prison was permitted by Shakur's religion. Shakur had no legal interest in Halal meat meals, except to the extent the government's failure to provide them interfered with his subjective religious experience. Nonetheless, we held that the failure of the prison to provide Halal meat meals could constitute a substantial burden on Shakur's religious exercise because the vegetarian meals allegedly "exacerbate[d] [Shakur's] hiatal hernia and cause[d] excessive gas that interfere[d] with the ritual purity required for [Shakur's] Islamic worship." *Id.* at 889. That is, although the government had in no way penalized Shakur's exercise of his re-

ligion by denying a benefit to which he was otherwise entitled, we held that RFRA may impose an affirmative duty on prison officials to provide Halal meat meals where the failure to do so harms the inmate's sense of "ritual purity." *Id.*

The provision of special meals is a government action that benefits an inmate. But this is true of virtually any religious accommodation. Thus, *Shakur* can only be explained as consistent with the majority's rule if the mere accommodation of religion is a governmental benefit. But such a broad rule cannot support the majority's conclusion in this case. Under such a definition, the Forest Service offers the Indians in this case a "government benefit" in the form of access to their sacred land and ritual materials. The Forest Service's failure to offer spiritually pure sites and materials is the equivalent of prison officials failing to offer religiously pure meals. In short, in denying the Indians' claims, the majority contends that the phrase "substantial burden" applies only where the government imposes sanctions or "condition[s] a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs." The majority then abandons this definition in its attempts to distinguish *Shakur*, which did not involve the conditioning of government benefits on conduct that would violate religious beliefs. The need for such semantic contortions only highlights the degree to which the majority's rule is inconsistent with our prior case law and fails to capture the meaning of the term "substantial burden."

2. The Applicability of RLUIPA

The majority's second misstatement is that RLUIPA does not apply to suits brought under RFRA. It writes:

> For two reasons, RLUIPA is inapplicable to this case. First, RLUIPA, by its terms, prohibits only state and local governments from applying regulations that govern land use or institutionalized persons to impose a "substantial burden" on the exercise of religion. . . . Subject to two exceptions not relevant here, RLUIPA does not apply to a federal government action, which is not at issue in this case. . . . Second, even for state and local governments, RLUIPA applies only to government land-use regulations of private land, not to the government's management of its own land.

Maj. op. at 10066. From this, the majority concludes that RLUIPA cases finding a "substantial burden" on the exercise of religion are irrelevant to RFRA cases.

It is true that much of RLUIPA applies specifically to state and local zoning decisions and to actions by prison officials. But it is demonstrably *not* true that RLUIPA is "inapplicable to this case," and that cases decided under RLUIPA may be disregarded in RFRA cases. Not only did RLUIPA amend the definition of "exercise of religion" contained in RFRA, RLUIPA also applies the same "substantial burden" test that is applied in RFRA cases.

Prior to the passage of RLUIPA in 2000, RFRA provided that "the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution." Pub. L. No. 103-141, § 5, 107 Stat. at 1489 (codified at 42 U.S.C. § 2000bb-2(4) (1994) (repealed)). RLUIPA changed the definition of "exercise of religion" in RFRA. RLUIPA §§ 7-8, 114 Stat. at 806-07. As a result of RLUIPA, 42 U.S.C. § 2000bb-2 now provides, "*As used in this chapter* — . . . (4) the term 'exercise of religion' means religious exercise, *as defined in section 2000cc-5 of this title.*" (emphasis

added). The "chapter" to which 2000bb-2 refers is Chapter 21B of Title 42. Chapter 21B is the codification of the Religious Freedom Restoration Act. Section 2000cc-5, to which § 2000bb-2 refers, provides, "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

RFRA and RLUIPA not only share the same definition of "exercise of religion," they also share the same analytic framework and terminology. Under both statutes, the imposition of a "substantial burden" on a person's "exercise of religion" may be justified only by a compelling governmental interest and a showing that such interest is furthered by the least restrictive means. *See* 42 U.S.C. § 2000bb-1(b) (RFRA); 42 U.S.C. § 2000cc-1(a)(1-2) (RLUIPA). The Supreme Court has explicitly stated that "the Religious Land Use and Institutionalized Persons Act of 2000 . . . allows federal and state prisoners to seek religious accommodation *pursuant to the same standard* as set forth in RFRA[.]" *O Centro*, 546 U.S. at 436 (emphasis added). Because RFRA and RLUIPA cases share the same analytic framework and terminology and are, in the words of the Court in *O Centro*, governed by the "same standard," RLUIPA cases are necessarily applicable to RFRA cases.

3. Applicability of RFRA to Federal Land

Finally, the majority misstates the law when it treats as an open question whether RFRA applies to federal land. The majority writes:

> The Defendants do not contend that RFRA is inapplicable to the government's use and management of its own land, which is at issue in this case. Because this issue was not raised or briefed

> by the parties, we have no occasion to consider it. Therefore, we assume, without deciding, that RFRA applies to the government's use and management of its land[.]

Maj. op. at 10048 n.9.

It is hardly an open question whether RFRA applies to federal land. For good reason, none of the defendants argued that RFRA is inapplicable to actions on federal land. There is nothing in the text of RFRA that says, or even suggests, that such a carve-out from RFRA exists. No case has ever so held, or even suggested, that RFRA is inapplicable to federal land.

The majority opinion uses silence of the briefs in this case as an excuse to treat the applicability of RFRA to federal land as an open question. However, the majority ignores the following exchange with the government's attorney during oral argument before the en banc panel. In that exchange, the government explicitly stated that RFRA applies to federal land:

> Question [by a member of the en banc panel]: Is it your position that the substantial burden test is simply never triggered when the government is using its own land? That it's simply outside the coverage of RFRA if the government is using its own land?
>
> Answer [by the government's attorney]: No, your honor, that is not our position. . . .
>
> Question: So, the use of government land has the potential under RFRA to impose a substantial burden?
>
> Answer: It is possible that certain activities on certain government land can still substantially burden religious activities.

Question: And would then violate RFRA if there were no compelling state interest?

Answer: Correct. Yes.

[En banc argument at 35:06.]

D. Misunderstanding of Religious Belief and Practice

In addition to misstating the law under RFRA, the majority misunderstands the nature of religious belief and practice. The majority concludes that spraying up to 1.5 million gallons of treated sewage effluent per day on Humphrey's Peak, the most sacred of the San Francisco Peaks, does not impose a "substantial burden" on the Indians' "exercise of religion." In so concluding, the majority emphasizes the lack of physical harm. According to the majority, "[T]here are no plants, springs, natural resources, shrines with religious significance, nor any religious ceremonies that would be physically affected" by using treated sewage effluent to make artificial snow. In the majority's view, the "sole effect" of using treated sewage effluent on Humphrey's Peak is on the Indians' "subjective spiritual experience." Maj. op. at 10041.

The majority's emphasis on physical harm ignores the nature of religious belief and exercise, as well as the nature of the inquiry mandated by RFRA. The majority characterizes the Indians' religious belief and exercise as merely a "subjective spiritual experience." Though I would not choose precisely those words, they come close to describing what the majority thinks it is *not* describing — a genuine religious belief and exercise. Contrary to what the majority writes, and appears to think, religious exercise in-

variably, and centrally, involves a "subjective spiritual experience."

Religious belief concerns the human spirit and religious faith, not physical harm and scientific fact. Religious exercise sometimes involves physical things, but the physical or scientific character of these things is secondary to their spiritual and religious meaning. The centerpiece of religious belief and exercise is the "subjective" and the "spiritual." As William James wrote, religion may be defined as "the feelings, acts, and experiences of individual men [and women] in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine." WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 31-32 (1929).

The majority's misunderstanding of the nature of religious belief and exercise as merely "subjective" is an excuse for refusing to accept the Indians' religion as worthy of protection under RFRA. According to undisputed evidence in the record, and the finding of the district court, the Indians in this case are sincere in their religious beliefs. The record makes clear that their religious beliefs and practice do not merely require the continued existence of certain plants and shrines. They require that these plants and shrines be spiritually pure, undesecrated by treated sewage effluent.

Perhaps the strength of the Indians' argument in this case could be seen more easily by the majority if another religion were at issue. For example, I do not think that the majority would accept that the burden on a Christian's exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on

an argument that no physical harm would result and any adverse effect would merely be on the Christian's "subjective spiritual experience." Nor do I think the majority would accept such an argument for an orthodox Jew if the government permitted only non-Kosher food.

E. Proper Application of RFRA

Applying our precedents, which properly reject the majority's restrictive approach, I would hold that the Indians have shown a substantial burden on the exercise of their religion under RFRA. I also believe that the Forest Service has failed to show that approval of the Snowbowl expansion was the least restrictive means to further a compelling governmental interest.

1. "Substantial Burden" on the "Exercise of Religion"

RFRA defines "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc5(7)(A). Under our prior case law, a "substantial burden" on the "exercise of religion" exists where government action prevents an individual "from engaging in [religious] conduct or having a religious experience" and the interference is "more than an inconvenience." *Bryant*, 46 F.3d at 949.

a. The Indians' "Sacred" Land and their "Exercise of Religion"

The Appellees do not dispute the sincerity of the Indians' testimony concerning their religious beliefs and practices, and the district court wrote that it was not "challenging the honest religious beliefs of any witness." The majority concedes that the Indians are

sincere. It writes, "The district court found the Plaintiffs' beliefs to be sincere; there is no basis to challenge that finding." Maj. op. at 10041.

The majority seeks to undermine the importance of the district court's finding, and its own concession, by contending that the Indians consider virtually everything sacred. It writes:

> In the Coconino National Forest alone, there are approximately a dozen mountains recognized as sacred by American Indian tribes. The district court found the tribes hold other landscapes to be sacred as well, such as canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes, rock formations, shrines, gathering areas, pilgrimage routes, and prehistoric sites. Within the Southwestern Region forest lands alone, there are between 40,000 and 50,000 prehistoric sites. The district court also found the Navajo and the Hualapai Plaintiffs consider the entire Colorado River to be sacred. New sacred areas are continuously being recognized by the Plaintiffs.

Maj. op. at 10046 n.7 (citations omitted).

The majority implies that if we hold, based on the sincerity of the Indians's religious belief, that there has been a substantial burden in this case, there is no stopping place. That is, since virtually everything is sacred, virtually any governmental action affecting the Indians' "sacred" land will be a substantial burden under RFRA.

The majority's implication rests upon an inadequate review of the record. The district court conducted a two-week trial devoted solely to the Indians' RFRA claim. The trial record demonstrates that the

word "sacred" is a broad and undifferentiated term. That term does not capture the various degrees in which the Indians hold land to be sacred. For example, Vincent Randall, an Apache legislator, historian, and cultural teacher, responded to a question regarding mountains that were "sacred sites" as follows:

> That's your term "sacred." That's not my term. I talked about holy mountains this morning. I talked about God's mountains. . . . Sacred to you is not the other terms. There are other places of honor and respect. You're looking at everything as being sacred. There is not — there is honor and respect, just as much as the Twin Towers is a place of honor and respect. Gettysburg. Yes, there are places like that in Apache land, *but there are four holy mountains. Holy mountains.*

Trial tr. 722-23 (emphasis added).

Dianna Uqualla, subchief of the Havasupai, again explained that there are different degrees of "sacred":

> The whole reservation is sacred to us, *but the mountains are more sacred.* They are like our — if you go to a church there would be like our tabernacle, that would be our altars. That's the — that's the difference like being in Fort Defiance or Window Rock versus going to each of the sacred mountains. The San Francisco Peaks would be like our tabernacle, our altar to the west.

SER 1253 (emphasis added).

Many White Mountain Apache, Navajo, and Havasupai members refer to all land that is owned, or was ever owned, by their tribe as sacred. For example, Ramon Riley, Cultural Resource Director for the White Mountain Apache, testified that the entire

Apache reservation is "sacred." Trial tr. at 625, 647-51. Uqualla testified to the same effect with respect to Havasuapai land. SER 1253.

But while there are many mountains within White Mountain Apache, Navajo, and Havasupai historic territory, only a few of these mountains are "holy" or particularly "sacred." For the White Mountain Apache, there are four holy mountains. They are the San Francisco Peaks, Mt. Graham, Mt. Baldy, and Red Mountain/Four Peaks. Trial tr. at 639-43. For the Navajo, there are also four holy mountains. They are the San Francisco Peaks, the Blanca Peak, Mt. Taylor, and the Hesperous Mountains. Trial tr. at 739.

The Indians allow different uses on sacred land depending the degree of sacredness. For example, Mount Baldy is one of the White Mountain Apache's holy mountains. Though they consider all of their reservation land "sacred" in the sense in which that term is used by the majority, Mount Baldy is not merely sacred. It is holy. The record is clear that the Apache do not permit camping, fishing, or hunting on the portion of Mount Baldy under their control, even though they permit such activities elsewhere on their reservation.

b. Substantial Burden on the Indians' Exercise of Religion

The record in this case makes clear that the San Francisco Peaks are particularly sacred to the surrounding Indian tribes. Humphrey's Peak is the most sacred, or holy, of the Peaks. I accept as sincere the Indians' testimony about their religious beliefs and practices, and I accept as sincere their testimony that the Peaks, and in particular Humphrey's Peak, are not merely sacred but holy mountains.

In the discussion that follows, I focus on the evidence presented by the Hopi and Navajo, and to a lesser extent on the Hualapai and Havasupai. I first describe the Indians' religious practices, and then discuss the effect the Snowbowl expansion would have on these practices.

i. The Indians' Religious Practices

(1) The Hopi

Hopi religious beliefs and practices center on the San Francisco Peaks. As stated by the district court, "The Peaks are where the Hopi direct their prayers and thoughts, a point in the physical world that defines the Hopi universe and serves as the home of the Kachinas, who bring water, snow and life to the Hopi people." 408 F. Supp. 2d at 894. The Hopi have been making pilgrimages to the Peaks since at least 1540, when they first encountered Europeans, and probably long before that.

The Hopi believe that when they emerged into this world, the clans journeyed to the Peaks (or *Nuvatukyaovi*, the "high place of snow") to receive instructions from a spiritual presence, *Ma'saw*. At the Peaks, they entered a spiritual covenant with *Ma'saw* to take care of the land, and then migrated down to the Hopi villages. The Hopi re-enact their emergence from the Peaks annually, and Hopi practitioners look to the Peaks in their daily songs and prayers as a place of tranquility, sanctity, and purity.

The Peaks are also the primary home of the powerful spiritual beings called *Katsinam* (Hopi plural of *Katsina*, or Kachina in English). Hundreds of specific *Katsinam* personify the spirits of plants, animals, people, tribes, and forces of nature. The *Katsinam* are the spirits of Hopi ancestors, and the Hopi believe

that when they die, their spirits will join the *Katsinam* on the Peaks. As spiritual teachers of "the Hopi way," the *Katsinam* teach children and remind adults of the moral principles by which they must live. These principles are embodied in traditional songs given by the *Katsinam* to the Hopi and sung by the Hopi in their everyday lives. One Hopi practitioner compared these songs to sermons, which children understand simplistically but which adults come to understand more profoundly. Many of these songs focus on the Peaks.

Katsinam serve as intermediaries between the Hopi and the higher powers, carrying prayers from the Hopi villages to the Peaks on an annual cycle. From July through January, the *Katsinam* live on the Peaks. In sixteen days of ceremonies and prayers at the winter solstice, the Hopi pray and prepare for the *Katsinam*'s visits to the villages. In February or March, the *Katsinam* begin to arrive, and the Hopi celebrate with nightly dances at which the *Katsinam* appear in costume and perform. The *Katsinam* stay while the Hopi plant their corn and it germinates. Then, in July, the Hopi mark the *Katsinam*'s departure for the Peaks.

The Hopi believe that pleasing the *Katsinam* on the Peaks is crucial to their livelihood. Appearing in the form of clouds, the *Katsinam* are responsible for bringing rain to the Hopi villages from the Peaks. The *Katsinam* must be treated with respect, lest they refuse to bring the rains from the Peaks to nourish the corn crop. In preparation for the *Katsinam*'s arrival, prayer sticks and feathers are delivered to every member of the village, which they then deposit in traditional locations, praying for the spiritual purity necessary to receive the *Katsinam*. The *Katsinam*

will not arrive until the peoples' hearts are in the right place, a state they attempt to reach through prayers directed at the spirits on the Peaks.

The Hopi have at least fourteen shrines on the Peaks. Every year, religious leaders select members of each of the approximately forty congregations, or *kiva*, among the twelve Hopi villages to make a pilgrimage to the Peaks. They gather from the Peaks both water for their ceremonies and boughs of Douglas fir worn by the *Katsinam* in their visits to the villages.

(2) The Navajo

The Peaks are also of fundamental importance to the religious beliefs and practices of the Navajo. The district court found, "[T]he Peaks are considered . . . to be the 'Mother of the Navajo People,' their essence and their home. The whole of the Peaks is the holiest of shrines in the Navajo way of life." 408 F. Supp. 2d at 889. Considering the mountain "like family," the Navajo greet the Peaks daily with prayer songs, of which there are more than one hundred relating to the four mountains sacred to the Navajo. Witnesses described the Peaks as "our leader" and "very much an integral part of our life, our daily lives."

The Navajo creation story revolves around the Peaks. The mother of humanity, called the Changing Woman and compared by one witness to the Virgin Mary, resided on the Peaks and went through puberty there, an event which the people celebrated as a gift of new life. Following this celebration, called the *kinaalda*, the Changing Woman gave birth to twins, from whom the Navajo are descended. The Navajo believe that the Changing Woman's *kinaalda* gave them life, generation after generation. Young

women today still celebrate their own *kinaalda* with a ceremony one witness compared to a Christian confirmation or a Jewish bat mitzvah. The ceremony sometimes involves water especially collected from the Peaks because of the Peaks' religious significance.

The Peaks are represented in the Navajo medicine bundles found in nearly every Navajo household. The medicine bundles are composed of stones, shells, herbs, and soil from each of four sacred mountains. One Navajo practitioner called the medicine bundles "our Bible," because they have "embedded" within them "the unwritten way of life for us, our songs, our ceremonies." The practitioner traced their origin to the Changing Woman: When her twins wanted to find their father, the Changing Woman instructed them to offer prayers to the Peaks and conduct ceremonies with medicine bundles. The Navajo believe that the medicine bundles are conduits for prayers; by praying to the Peaks with a medicine bundle containing soil from the Peaks, the prayer will be communicated to the mountain.

As their name suggests, medicine bundles are also used in Navajo healing ceremonies, as is medicine made with plants collected from the Peaks. Appellant Norris Nez, a Navajo medicine man, testified that "like the western doctor has his black bag with needles and other medicine, this bundle has in there the things to apply medicine to a patient." Explaining why he loves the mountain as his mother, he testified, "She is holding medicine and things to make us well and healthy. We suckle from her and get well when we consider her our Mother." Nez testified that he collects many different plants from the Peaks to make medicine.

The Peaks play a role in every Navajo religious ceremony. The medicine bundle is placed to the west, facing the Peaks. In the Blessingway ceremony, called by one witness "the backbone of our ceremony" because it is performed at the conclusion of all ceremonies, the Navajo pray to the Peaks by name.

The purity of nature, including the Peaks, plays an important part in Navajo beliefs. Among other things, it affects how a medicine bundle — described by one witness as "a living basket" — is made. The making of a medicine bundle is preceded by a four-day purification process for the medicine man and the keeper of the bundle. By Navajo tradition, the medicine bundle should be made with leather from a buck that is ritually suffocated; the skin cannot be pierced by a weapon. Medicine bundles are "rejuvenated" every few years, by replacing the ingredients with others gathered on pilgrimages to the Peaks and three other sacred mountains.

The Navajo believe their role on earth is to take care of the land. They refer to themselves as *nochoka dine*, which one witness translated as "people of the earth" or "people put on the surface of the earth to take care of the lands." They believe that the Creator put them between four sacred mountains of which the westernmost is the Peaks, or *Do'ok'oos-liid* ("shining on top," referring to its snow), and that the Creator instructed them never to leave this homeland. Although the whole reservation is sacred to the Navajo, the mountains are the most sacred part. As noted previously, one witness drew an analogy to a church, with the area within the mountains as the part of the church where the people sit, and the Peaks as "our altar to the west."

As in Hopi religious practice, the Peaks are so sacred in Navajo beliefs that, according to Joe Shirley, Jr., President of the Navajo Nation, a person "cannot just voluntarily go up on this mountain at any time. It's — it's the holiest of shrines in our way of life. You have to sacrifice. You have to sing certain songs before you even dwell for a little bit to gather herbs, to do offerings." After the requisite preparation, the Navajo go on pilgrimages to the Peaks to collect plants for ceremonial and medicinal use.

(3) The Hualapai

The Peaks figure centrally in the beliefs of the Hualapai. The Hualapai creation story takes place on the Peaks. The Hualapai believe that at one time the world was deluged by water, and the Hualapai put a young girl on a log so that she could survive. She landed on the Peaks, alone, and washed in the water. In the water, she conceived a son, who was a man born of water. She washed again, and conceived another son. These were the twin warriors or war gods, from whom the Hualapai are today descended. Later, one of the twins became ill, and the other collected plants and water from the Peaks, thereby healing his brother. From this story comes the Hualapai belief that the mountain and its water and plants are sacred and have medicinal properties. One witness called the story of the deluge, the twins, and their mother "our Bible story" and drew a comparison to Noah's Ark. As in Biblical parables and stories, Hualapai songs and stories about the twins are infused with moral principles.

Hualapai spiritual leaders travel to the Peaks to deliver prayers. Like the Hopi and the Navajo, the Hualapai believe that the Peaks are so sacred that one has to prepare oneself spiritually to visit. A spiri-

tual leader testified that he prays to the Peaks every day and fasts before visiting to perform the prayer feather ceremony. In the prayer feather ceremony, a troubled family prays into an eagle feather for days, and the spiritual leader delivers it to the Peaks; the spirit of the eagle then carries the prayer up the mountain and to the Creator.

The Hualapai collect water from the Peaks. Hualapai religious ceremonies revolve around water, and they believe water from the Peaks is sacred. In their sweat lodge purification ceremony, the Hualapai add sacred water from the Peaks to other water, and pour it onto heated rocks to make steam. In a healing ceremony, people seeking treatment drink from the water used to produce the steam and are cleansed by brushing the water on their bodies with feathers. At the conclusion of the healing ceremony, the other people present also drink the water. A Hualapai tribal member who conducts healing ceremonies testified that water from the Peaks is used to treat illnesses of "high parts" of the body like the eyes, sinuses, mouth, throat, and brain, including tumors, meningitis, forgetfulness, and sleepwalking. He testified that the Peaks are the only place to collect water with those medicinal properties, and that he travels monthly to the Peaks to collect it from Indian Springs, which is lower on the mountain and to the west of the Snowbowl. The water there has particular significance to the Hualapai because the tribe's archaeological sites are nearby.

In another Hualapai religious ceremony, when a baby has a difficult birth, a Hualapai spiritual leader brings a portion of the placenta to the Peaks so that the child will be strong like the twins and their mother in the Hualapai creation story. The Hualapai

also grind up ponderosa pine needles from the Peaks in sacred water from the Peaks to aid women in childbirth.

A Hualapai religious law forbids mixing the living and the dead. In testimony in the district court, a spiritual leader gave the example of washing a baby or planting corn immediately after taking part in a death ceremony. Mixing the two will cause a condition that was translated into English as "the ghost sickness." The leader testified that purification after "touching death" depends on the intensity of the encounter. If he had just touched the dead person's clothes or belongings, he might be purified in four days, but if he touched a body, it would require a month.

(4) The Havasupai

The Peaks are similarly central to the beliefs of the Havasupai, as the Forest Service acknowledged in the FEIS:

> The Hualapai and the Havasupai perceive the world as flat, marked in the center by the San Francisco Peaks, which were visible from all parts of the Havasupai territory except inside the Grand Canyon. The commanding presence of the Peaks probably accounts for the Peaks being central to the Havasupai beliefs and traditions, even though the Peaks themselves are on the edge of their territory.

The Chairman of the Havasupai testified that the Peaks are the most sacred religious site of the Havasupai: "That is where life began." The Havasupai believe that when the earth was submerged in water, the tribe's "grandmother" floated on a log and landed

and lived on the Peaks, where she survived on water from the Peaks' springs and founded the tribe.

Water is central to the religious practices of the Havasupai. Although they do not travel to the Peaks to collect water, Havasupai tribal members testified that they believe the water in the Havasu creek that they use in their sweat lodges comes ultimately from the Peaks, to which they pray daily. They believe that spring water is a living, life-giving, pure substance, and they do not use tap water in their religious practices. They perform sweat lodge ceremonies, praying and singing as they use the spring water to make steam; they believe that the steam is the breath of their ancestors, and that by taking it into themselves they are purified, cleansed, and healed. They give water to the dead to take with them on their journey, and they use it to make medicines. The Havasupai also gather rocks from the Peaks to use for making steam.

ii. The Burden Imposed by the Proposed Snowbowl Expansion

Under the proposed expansion of the Snowbowl, up to 1.5 million gallons per day of treated sewage effluent would be sprayed on Humphrey's Peak from November through February. Depending on weather conditions, substantially more than 100 million gallons of effluent could be deposited over the course of the winter ski season.

The Indians claim that the use of treated sewage effluent to make artificial snow on the Peaks would substantially burden their exercise of religion. Because the Indians' religious beliefs and practices are not uniform, the precise burdens on religious exercise vary among the Appellants. Nevertheless, the bur-

dens fall roughly into two categories: (1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated — physically, spiritually, or both — for sacramental use; and (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination.

The first burden — the inability to perform religious ceremonies because of contaminated resources — has been acknowledged and described at length by the Forest Service. The FEIS summarizes: "Snowmaking and expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of these tribes." Further, "the use of reclaimed water is believed by the tribes to be impure and would have an irretrievable impact on the use of the soil, plants, and animals for medicinal and ceremonial purposes throughout the entire Peaks, as the whole mountain is regarded as a single, living entity."

Three Navajo practitioners' testimony at trial echoed the Forest Service's assessment in describing how the proposed action would prevent them from performing various ceremonies. Larry Foster, a Navajo practitioner who is training to become a medicine man, testified that "once water is tainted and if water comes from mortuaries or hospitals, for Navajo there's no words to say that that water can be reclaimed." He further testified that he objected to the current use of the Peaks as a ski area, but that using

treated sewage effluent to make artificial snow on the Peaks would be "far more serious." He explained, "I can live with a scar as a human being. But if something is injected into my body that is foreign, a foreign object — and reclaimed water, in my opinion, could be water that's reclaimed through sewage, wastewater, comes from mortuaries, hospitals, there could be disease in the waters — and that would be like injecting me and my mother, my grandmother, the Peaks, with impurities, foreign matter that's not natural."

Foster testified that if treated sewage effluent were used on the Peaks he would no longer be able to go on the pilgrimages to the Peaks that are necessary to rejuvenate the medicine bundles, which are, in turn, a part of every Navajo healing ceremony. He explained:

> Your Honor, our way of life, our culture we live in — we live in the blessingway, in harmony. We try to walk in harmony, be in harmony with all of nature. And we go to all of the sacred mountains for protection. We go on a pilgrimage similar to Muslims going to Mecca. And we do this with so much love, commitment and respect. And if one mountain — and more in particularly with the San Francisco Peaks — which is our bundle mountain, or sacred, bundle mountain, were to be poisoned or given foreign materials that were not pure, it would create an imbalance — there would not be a place among the sacred mountains. We would not be able to go there to obtain herbs or medicines to do our ceremonies, because that mountain would then become impure. It would not be pure anymore. And it would be a devastation for our people.

Appellant Navajo medicine man Norris Nez testified that the proposed action would prevent him from practicing as a medicine man. He told the district court that the presence of treated sewage effluent would "ruin" his medicine, which he makes from plants collected from the Peaks. He also testified that he would be unable to perform the fundamental Blessing-way ceremony, because "all [medicine] bundles will be affected and we will have nothing to use eventually."

Foster, Nez, and Navajo practitioner Steven Begay testified that because they believe the mountain is an indivisible living entity, the entire mountain would be contaminated even if the millions of gallons of treated sewage effluent are put onto only one area of the Peaks. According to Foster, Nez, and Begay, there would be contamination even on those parts of the Peaks where the effluent would not come into physical contact with particular plants or ceremonial areas. To them, the contamination is not literal in the sense that a scientist would use the term. Rather, the contamination represents the poisoning of a living being. In Foster's words, "[I]f someone were to get a prick or whatever from a contaminated needle, it doesn't matter what the percentage is, your whole body would then become contaminated. And that's what would happen to the mountain." In Nez's words, "All of it is holy. It is like a body. It is like our body. Every part of it is holy and sacred." In Begay's words, "All things that occur on the mountain are a part of the mountain, and so they will have connection to it. We don't separate the mountain."

The Hualapai also presented evidence that the proposed action would prevent them from performing particular religious ceremonies. Frank Mapatis, a

Hualapai practitioner and spiritual leader who visits the Peaks approximately once a month to collect water for ceremonies and plants for medicine, testified that the use of treated sewage effluent would prevent him from performing Hualapai sweat lodge and healing ceremonies with the sacred water from the Peaks. Mapatis testified that he believes that the treated sewage effluent would seep into the ground and into the spring below the Snowbowl where he collects his sacred water, so that the spring water would be "contaminated" by having been "touched with death." Because contact between the living and the dead induces "ghost sickness," which involves hallucinations, using water touched with death in healing ceremonies "would be like malpractice." Further, Mapatis would become powerless to perform the healing ceremony for ghost sickness itself, because that ceremony requires water from the Peaks, the only medicine for illnesses of the upper body and head, like hallucinations.

The second burden the proposed action would impose — undermining the Indians' religious faith, practices, and way of life by desecrating the Peaks' purity— is also shown in the record. The Hopi presented evidence that the presence of treated sewage effluent on the Peaks would fundamentally undermine all of their religious practices because their way of life, or "beliefway," is largely based on the idea that the Peaks are a pure source of their rains and the home of the *Katsinam*.

Leigh Kuwanwisiwma, a Hopi religious practitioner and the director of the tribe's Cultural Preservation Office, explained the connection between contaminating the Peaks and undermining the Hopi religion:

> The spiritual covenant that the Hopi clans entered into with the Caretaker I refer to as Ma'saw, the spiritual person and the other d[ei]ties that reside — and the Katsina that reside in the Peaks started out with the mountains being in their purest form. They didn't have any real intrusion by humanity.
>
> The purity of the spirits, as best we can acknowledge the spiritual domain, we feel were content in receiving the Hopi clans. So when you begin to intrude on that in a manner that is really disrespectful to the Peaks and to the spiritual home of the Katsina, it affects the Hopi people. It affects the Hopi people, because as clans left and embarked on their migrations and later coming to the Hopi villages, we experienced still a mountain and peaks that were in their purest form as a place of worship to go to, to visit, to place our offerings, the tranquility, the sanctity that we left a long time ago was still there.

Antone Honanie, a Hopi practitioner, testified that he would have difficulty preparing for religious ceremonies, because treated sewage effluent is "something you can't get out of your mind when you're sitting there praying" to the mountain, "a place where everything is supposed to be pure." Emory Sekaquaptewa, a Hopi tribal member and research anthropologist, testified that the desecration of the mountain would cause *Katsinam* dance ceremonies to lose their religious value. They would "simply be a performance for performance['s] sake" rather than "a religious effort": "Hopi people are raised in this belief that the mountains are a revered place. And even though they begin with kind of a fantasy notion, this continues to grow into a more deeper spiritual sense of the moun-

tain. So that any thing that interrupts this perception, as they hold it, would tend to undermine the — the integrity in which they hold the mountain."

Summarizing the Hopi's testimony, the district court wrote:

> The individual Hopi's practice of the Hopi way permeates every part and every day of the individual's life from birth to death. . . . The Hopi Plaintiffs testified that the proposed upgrades to the Snowbowl have affected and will continue to negatively affect the way they think about the Peaks, the Kachina and themselves when preparing for any religious activity involving the Peaks and the Kachina — from daily morning prayers to the regular calendar of religious dances that occur throughout the year. . . . The Hopi Plaintiffs also testified that this negative effect on the practitioners' frames of mind due to the continued and increased desecration of the home of the Kachinas will undermine the Hopi faith and the Hopi way. According to the Hopi, the Snowbowl upgrades will undermine the Hopi faith in daily ceremonies and undermine the Hopi faith in their Kachina ceremonies as well as their faith in the blessings of life that they depend on the Kachina to bring.

408 F. Supp. 2d at 894-95.

The Havasupai presented evidence that the presence of treated sewage effluent on the Peaks would, by contaminating the Peaks, undermine their sweat lodge purification ceremonies and could lead to the end of the ceremonies. Rex Tilousi, Chairman of the Havasupai, testified that Havasupai religious stories teach that the water in Havasu Creek, which they

use for their sweat ceremonies, flows from the Peaks, where the Havasupai believe life began. Although none of the three Havasupai witnesses stated that they would be completely unable to perform the sweat lodge ceremonies as a consequence of the impurity introduced by the treated sewage effluent, Roland Manakaja, a traditional practitioner, testified that the impurity would disrupt the ceremony:

> If I was to take the water to sprinkle the rocks to bring the breath of our ancestors — we believe the steam is the breath of our ancestors. And the rocks placed in the west signify where our ancestors go, the deceased. . . . Once the steam rises, like it does on the Peaks, the fog or the steam that comes off is creation. And once the steam comes off and it comes into our being, it purifies and cleanses us and we go to the level of trance . . . . It's going to impact mentally my spirituality. Every time I think about sprinkling that water on the rocks, I'm going to always think about this sewer that they're using to recharge the aquifer.

He further testified that he was "concerned" that the water's perceived impurity might cause the sweat lodge ceremony to die out altogether, if tribal members fear "breathing the organisms or the chemicals that may come off the steam."

The record supports the conclusion that the proposed use of treated sewage effluent on the San Francisco Peaks would impose a burden on the religious exercise of all four tribes discussed above — the Navajo, the Hopi, the Hualapai, and the Havasupai. However, on the record before us, that burden falls most heavily on the Navajo and the Hopi. The Forest Service itself wrote in the FEIS that the Peaks are

the most sacred place of both the Navajo and the Hopi; that those tribes' religions have revolved around the Peaks for centuries; that their religious practices require pure natural resources from the Peaks; and that, because their religious beliefs dictate that the mountain be viewed as a whole living being, the treated sewage effluent would in their view contaminate the natural resources throughout the Peaks. Navajo Appellants presented evidence in the district court that, were the proposed action to go forward, contamination by the treated sewage effluent would prevent practitioners from making or rejuvenating medicine bundles, from making medicine, and from performing the Blessingway and healing ceremonies. Hopi Appellants presented evidence that, were the proposed action to go forward, contamination by the effluent would fundamentally undermine their entire system of belief and the associated practices of song, worship, and prayer, that depend on the purity of the Peaks, which is the source of rain and their livelihoods and the home of the *Katsinam* spirits.

In light of this showing, it is self-evident that the Snow-bowl expansion prevents the Navajo and Hopi "from engaging in [religious] conduct or having a religious experience" and that this interference is "more than an inconvenience." *Bryant,* 46 F.3d at 949.The burden imposed on the religious practices of the Navajo and Hopi is certainly as substantial as the intrusion on confession deemed a "substantial burden" in *Mockaitis*, 104 F.3d at 1531, and the denial of a Halal or Kosher meat diet deemed a "substantial burden" in *Shakur*, 514 F.3d at 888-89. Thus, under RFRA, the Forest Service's approval of the Snowbowl expansion may only survive if it furthers a compelling governmental interest by the least restrictive means.

c. "Compelling Governmental Interest" and "Least Restrictive Means"

The majority refuses to hold that spraying treated sewage effluent on Humphrey's Peak imposes a "substantial burden" on the Indians' "exercise of religion." It therefore does not reach the question whether the burden can be justified by a compelling interest and is the least restrictive means of furthering that purpose. Because I would hold that the Snowbowl expansion does constitute a substantial burden on the Indians' religious exercise, I also address this second step of the RFRA analysis.

"Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. In applying this standard, we do not accept a generalized assertion of a compelling interest, but instead require "a case-by-case determination of the question, sensitive to the facts of each particular claim." *O Centro*, 546 U.S. at 431 (quoting *Smith*, 494 U.S. at 899 (O'Connor, J., concurring in the judgment)).

The Forest Service and the Snowbowl have argued that approving the use of treated sewage effluent to make artificial snow serves several compelling governmental interests. The district court characterized those interests as: (1) "selecting the alternative that best achieves [the Forest Service's] multiple-use mandate under the National Forest Management Act," which includes "managing the public land for recreational uses such as skiing"; (2) protecting public safety by "authorizing upgrades at Snowbowl to ensure that users of the National Forest ski area have a safe experience"; and (3) complying with the

Establishment Clause. 408 F. Supp. 2d at 906. I would hold that none of these interests is compelling.

First, the Forest Service's interests in managing the forest for multiple uses, including recreational skiing, are, in the words of the Court in *O Centro*, "broadly formulated interests justifying the general applicability of government mandates" and are therefore insufficient on their own to meet RFRA's compelling interest test. 546 U.S. at 431. Appellees have argued that approving the proposed action serves the more particularized compelling interest in providing skiing at the Snowbowl, because the use of artificial snow will allow a more "reliable and consistent operating season" at one of the only two major ski areas in Arizona. I do not believe that authorizing the use of artificial snow at an already functioning commercial ski area in order to expand and improve its facilities, as well as to extend its ski season in dry years, is a governmental interest "of the highest order." *Yoder*, 406 U.S. at 215.

Second, while the Forest Service undoubtedly has a general interest in ensuring public safety on federal lands, there has been no showing that approving the proposed action advances that interest by the least restrictive means. Appellees have provided no specific evidence that skiing at the Snowbowl in its current state is unsafe.

Third, approving the proposed action does not serve a compelling governmental interest in avoiding conflict with the Establishment Clause. The Forest Service has not suggested that avoiding a conflict with the Establishment Clause is a compelling interest served by the proposed action. Only the Snowbowl has made that argument. The argument is not convincing. The Supreme Court has repeatedly held that

the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.* (citations omitted); *see also Hobbie v. Unemp. App. Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."). Refusing to allow a commercial ski resort in a national forest to spray treated sewage effluent on the Indians' most sacred mountain is an accommodation that falls far short of the sort of advancement of religion that gives rise to an Establishment Clause violation.

F. Conclusion

I would therefore hold that the proposed expansion of the Arizona Snowbowl, which would entail spraying up to 1.5 million gallons per day of treated sewage effluent on the holiest of the San Francisco Peaks, violates RFRA. The expansion would impose a "substantial burden" on the Indians' "exercise of religion" and is not justified by a "compelling government interest."

II. National Environmental Protection Act

A. Pleading under Rule 8(a)

The majority concludes that Appellants failed properly to plead a violation of NEPA in their complaint. The violation in question is an alleged failure by the Forest Service to analyze the risks posed by human ingestion of artificial snow made with treated sewage effluent. Because of the asserted pleading

mistake, the majority declines to reach the merits of the claimed violation.

Under Federal Rule of Civil Procedure 8(a), a proper complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a), adopted in 1938, replaced the old "code pleading" regime under which plaintiffs had been required to plead detailed factual allegations in the complaint, on pain of having their complaints dismissed on demurrer. Under the more relaxed "notice pleading" requirement of Rule 8(a), a plaintiff is not required to plead detailed facts. Under Rule 8(a), a plaintiff is required only to "advise the other party of the event being sued upon, . . . provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel, and . . . indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this." 5 C. Wright & A. Miller, Federal Practice & Procedure § 1202 (2008).

Appellants' complaint in the district court, while general, was sufficient to provide notice that they were asserting NEPA violations based on the Forest Service's failure to consider the health risks presented by the Snowbowl expansion. The Navajo Nation and the Havasupai Tribe both alleged in their complaints that the Forest Service violated NEPA by "fail[ing] to take a 'hard look' at the impacts of introducing reclaimed waste water to the ecosystem." [SER 1184; 1200]. In particular, they alleged, "The FEIS fails to adequately address the effects of soil disturbance, and the persistent pollutants in reclaimed water." *Id.*

In another context, generalized allegations such as these might be insufficient to alert defendants that a specific health risk, such as the ingestion of artificial snow, was included in general statements referring to "the impacts of introducing reclaimed waste water to the ecosystem" and "persistent pollutants in reclaimed water." In the context of this case, however, Appellants' allegations were sufficient to put defendants on notice of the nature of their NEPA claim.

First, even before the complaint was filed, the Forest Service was well aware of the dispute about whether the FEIS adequately addressed the risk of children and others ingesting artificial snow made from treated sewage effluent. For example, in October 2002, before the draft EIS was published, the Service wrote what it called a "strategic talking point" addressing the risk posed by the ingestion of the artificial snow. The "talking point" began with the question: "Will my kids get sick if they eat artificial snow made from treated wastewater?" It continued with a scripted answer: "[T]his question is really one that will be thoroughly answered in the NEPA analysis process." Appellants repeatedly made clear to the Forest Service, both in comments on the draft EIS and in administrative appeals, that this risk needed to be addressed as part of the NEPA process.

Second, Appellants raised the issue of ingestion of artificial snow in their motion for summary judgment, specifically addressing several pages to the following argument: "The FEIS Does Not Contain a 'Reasonably Thorough Discussion of the Significant Aspects of the Probable Environmental Consequences' of the Project — The FEIS Ignores (In Part) the Possibility of Children Eating Snow Made from Reclaimed Water." [Plaintiffs' Motion for Summary

Judgment at 20-23]. The Forest Service and the Snowbowl both objected that this argument was not adequately alleged in the complaint. But they showed no prejudice arising out of the alleged lack of notice, and they addressed the merits of the issue in their opposition to the motion. [Defendant's Response In Opposition to All Plaintiffs' Motions for Summary Judgment at 16-17; Arizona Snowbowl Resort LP's Opposition to Plaintiffs' Motions for Summary Judgment at 5-6].

Third, Appellants had raised the issue of ingestion of artificial snow in their administrative appeal, and the Forest Service had no need to develop additional evidence, through discovery or otherwise, in order to address the issue in the district court.

The majority objects to this analysis on two grounds. First, it contends that because Appellants have not appealed the district court's denial of their motion to amend their complaint, they cannot now contend that their complaint was adequate. Maj. op. at 10070-71 & n.26. That is not the law. If a complaint is adequate under Rule 8(a), there is no need to amend it. It is well established that if a plaintiff believes that a complaint satisfies Rule 8(a), he or she may stand on the complaint and appeal a dismissal to the court of appeals. *See WMX Technologies, Inc. v. Miller*, 80 F.3d 1315, 1318 (9th Cir. 1996) (citing *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 471 n.3 (9th Cir. 1994) (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1053 (9th Cir.1992))). A plaintiff may move to amend a complaint that, in the view of the district court, is inadequate under Rule 8(a). But making such a motion is not an admission, for purposes of appeal, that the district court is correct in viewing the complaint as

inadequate. Nor, having made such a motion, is the plaintiff required to appeal the district court's denial of that motion in order to assert that the initial complaint was adequate. *See, e.g.*, *Quinn v. Ocwen Federal Bank FSB*, 470 F.3d 1240, 1247 n.2 (8th Cir. 2006).

Second, the majority contends that the Navajo Appellants "do not explain why their complaint is otherwise sufficient to state this NEPA claim—despite the Defendants' assertion that the Navajo Plaintiffs failed to plead this NEPA claim." Maj. op. at 10070. The majority is wrong. The Navajo Appellants clearly "explain" why their complaint was sufficient. Part III.B of their brief in this court is headed: "The FEIS Ignores the Possibility of Children Eating Snow Made from Reclaimed Water." Part III.B.3 of their brief is headed: "This Issue Was Properly Raised and Considered by the Lower Court." [Reply brief, at 19] The first paragraph of Part III.B.3 reads:

> Defendants assert that Plaintiffs did not raise this issue in their comments on the the DEIS, in their administrative appeal, *or in their Complaint*. As a result, according to defendants, Plaintiffs are precluded from raising this argument on appeal. *This misstates the facts of the case and applicable law*.

[*Id.*] (Emphasis added).

The Navajo Appellants explain in their brief that the issue of children eating snow made from effluent was raised during the preparation of the FEIS. They explain that defendants were therefore already well aware of this issue when it was raised in the district court. They explain, further, in their brief in this court: "Plaintiffs properly pled violations of NEPA in

their Complaint, even though the specific allegations at issue were not included therein. The issue [of the FEIS's failure to analyze the risk of children ingesting snow made from treated effluent] was briefed at summary judgment by all parties and presented at oral argument. The lower court heard the argument . . . and issued a decision on this claim resulting in this appeal." *Id.* at 23-4.

Under notice pleading, a plaintiff need not make specific allegations in the complaint, so long as the complaint is sufficient to put defendant on notice of the nature of plaintiff's claim. As the Navajo Appellants make clear, the defendants in the district court were well aware of the nature of plaintiffs' claim that the FEIS failed to analyze the risk of children eating snow made from the effluent. This is sufficient to satisfy the notice pleading requirement of Rule 8(a).

I would therefore reach the merits of Appellants' claim that the Forest Service failed to study adequately the risks posed by human ingestion of artificial snow made with treated sewage effluent.

B. Merits

"NEPA 'does not mandate particular results,' but 'simply provides the necessary process' to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). Regulations require that an EIS discuss environmental impacts "in proportion to their significance." 40 C.F.R. § 1502.2(b). For impacts discussed only briefly, there should be "enough discussion to show why more study is not warranted." *Id.*

We employ a "'rule of reason [standard] to determine whether the [EIS] contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (first alteration in original) (quoting *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1071 (9th Cir. 2002)). In reviewing an EIS, a court must not substitute its judgment for that of the agency, but rather must uphold the agency decision as long as the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953-54 (9th Cir. 2003) (quoting *Wash. Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1990)).

The treated sewage effluent proposed for use in making artificial snow at the Snowbowl meets the standards of the ADEQ for what Arizona calls "A+ reclaimed water." The ADEQ permits use of A+ reclaimed water for snowmaking, but it has specifically disapproved human ingestion of such water. Arizona law requires users of reclaimed water to "place and maintain signage at locations [where the water is used] so the public is informed that reclaimed water is in use and that no one should drink from the system." Ariz. Admin. Code § R18-9-704(H) (2005). Human consumption, "full-immersion water activity with a potential of ingestion," and "evaporative cooling or misting" are all prohibited. *Id.* § R18-9-704(G)(2). Irrigation users must employ "application methods that reasonably preclude human contact," including preventing "contact with drinking fountains, water coolers, or eating areas," and preventing the treated effluent from "standing on open access

areas during normal periods of use." *Id.* § R18-9-704(F).

The FEIS does not contain a reasonably thorough discussion of the risks posed by possible human ingestion of artificial snow made from treated sewage effluent, and it does not articulate why such discussion is unnecessary.

The main body of the FEIS addresses the health implications of using treated sewage effluent in subchapter 3H, "Watershed Resources." Much of the subchapter's analysis focuses on the "hydrogeologic setting" and on the effect of the artificial snow once it has melted. The part of the subchapter describing the treated sewage effluent acknowledges that its risks to human health are not well known because it contains unregulated contaminants in amounts not ordinarily found in drinking water, including prescription drugs and chemicals from personal care products. The subchapter contains tables listing the amounts of various organic and inorganic chemical constituents that have been measured in the treated sewage effluent. One table compares the level of contaminants in Flagstaff' s treated sewage effluent to the level permitted under national drinking water standards. The table shows that Flagstaff simply does not test for the presence of the following contaminants regulated by the national standards: Acrylamide, Dalapon, Di(2-ethylhexyl) adipate, Dinoseb, Diquat, Endothall, Epichlorohydrin, Ethylene dibromide, Lindane, Oxamyl (Vydate), Picloram, Simazine, and Aluminum. The table also shows that Flagstaff does not measure the following contaminants with sufficient precision to determine whether they are present at levels that exceed the national standards: Nitrate, Benzo (a) pyrene (PAHs), Pentachlorophenol, and Polychlori-

natedbiphenyls (PCBs). However, the FEIS does not go on to discuss either the health risks resulting from ingestion of the treated sewage effluent or the likelihood that humans — either adults or children — will in fact ingest the artificial snow.

Instead, the environmental impact analysis in subchapter 3H, the only part of the FEIS to discuss the characteristics of treated sewage effluent, addresses only the impact on the watersheds and aquifers. That analysis assesses the treated sewage effluent's impact after it has filtered through the ground, a process the FEIS estimates may result in "an order of magnitude decrease in concentration of solutes." Thus, although the subchapter reasonably discusses the human health risks to downgradient users, it does not address the risks entailed in humans' direct exposure to, and possible ingestion of, undiluted treated sewage effluent that has not yet filtered through the ground.

Only two statements in the FEIS could possibly be mistaken for an analysis of the risk that children would ingest the artificial snow. The first follows three combined questions by a commenter: (1) whether signs would be posted to warn that "reclaimed water" has been used to make the artificial snow; (2) how much exposure to the snow would be sufficient to make a person ill; and (3) how long it would take to see adverse effects on plants and animals downstream. The response to these questions is four sentences long. It states that signs would be posted, but it does not say how numerous or how large the signs would be. It then summarizes the treatment the sewage would undergo. The final sentence asserts: "In terms of microbiological and chemical water quality, the proposed use of reclaimed water for snowmaking

represents a low risk of acute or chronic adverse environmental impact to plants, wildlife, and humans."

This response does not answer the specific and highly relevant question: How much direct exposure to the artificial snow is safe? Nor does the response provide any analysis of the extent of the likely "exposure," including the likelihood that children or adults would accidentally or intentionally ingest the snow made from non-potable treated sewage effluent.

Another statement appears on the last page of responses to comments in the FEIS. The questions and response are:

> [Question:] In areas where reclaimed water is presently used, there are signs posted to warn against consumption of the water. Will these signs be posted at the Snowbowl? If so, how will that keep children from putting snow in there [sic] mouths or accidentally consuming the snow in the case of a wreck?
>
> [Answer:] There will be signs posted at Snowbowl informing visitors of the use of reclaimed water as a snowmaking water source. Much like areas of Flagstaff where reclaimed water is used, it is the responsibility of the visitor or the minor's guardian to avoid consuming snow made with reclaimed water. It is important to note that machine-produced snow would be mixed and therefore diluted with natural snow decreasing the percentage of machine-produced snow within the snowpack. Because ADEQ approved the use of reclaimed water, it is assumed different types of incidental contact that could potentially occur from use of class A reclaimed water for snowmaking were fully considered.

There are several problems with this response. First, the response does not assess the risk that children will eat the artificial snow. Stating that it is the parents' responsibility to prevent their children from doing so neither responds to the question whether signs would prevent children from eating snow nor addresses whether ingesting artificial snow would be harmful. Second, the Forest Service's assumption that the ADEQ's approval means the snow must be safe for ingestion is inconsistent with that same agency's regulations, which are designed to prevent human ingestion. Third, the assumption that the ADEQ actually analyzed the risk of skiers ingesting the treated sewage effluent snow is not supported by any evidence in the FEIS (or elsewhere in the administrative record). Finally, the Forest Service's answer is misleading in stating that the treated sewage effluent will be "diluted." The artificial snow would itself be made entirely from treated sewage effluent and would only be "mixed and therefore diluted" with natural snow insofar as the artificial snow intermingles with a layer of natural snow. During a dry winter, there may be little or no natural snow with which to "dilute" the treated sewage effluent.

Appellees have also contended that the FEIS "sets forth relevant mitigation measures" to "the possibility that someone may ingest snow." Although Appellees have not specified the "relevant mitigation measures" to which they refer, the only mitigation measure mentioned in the FEIS is the requirement under Arizona law that the Snowbowl post signs "so the public is informed that reclaimed water is in use and that no one should drink from the system." Ariz. Admin. Code § R18-9- 704(H) (2005). This "mitigation measure" is not listed along with the fifty-five mitigation measures catalogued in a table in the FEIS. *Cf.*

40 C.F.R. § 1502.14(f) (requiring agencies to include "appropriate mitigation measures" in the EIS's description of the proposal and its alternatives). The measure's omission from the FEIS table is hardly surprising, however, given that the FEIS does not address as an environmental impact the risk to human health from the possible ingestion of artificial snow made from treated sewage effluent.

Our role in reviewing the FEIS under the APA is not to second-guess a determination by the Forest Service about whether artificial snow made from treated sewage effluent would be ingested and, if so, whether such ingestion would threaten human health. We are charged, rather, with evaluating whether the FEIS contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Ctr. for Biological Diversity*, 349 F.3d at 1166 (quotation marks omitted). An agency preparing an EIS is required to take a "hard look" that "[a]t the least . . . encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail." *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005) (citing *Robertson*, 490 U.S. 332, 350 (1989) (stating that NEPA requires environmental costs to be "adequately identified and evaluated")). A proper NEPA analysis will "foster both informed decisionmaking and informed public participation." *Churchill County v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

I do not believe that the Forest Service has provided a "reasonably thorough discussion" of any risks posed by human ingestion of artificial snow made

from treated sewage effluent or articulated why such a discussion is unnecessary, has provided a "candid acknowledgment" of any such risks, and has provided an analysis that will "foster both informed decision-making and informed public participation." I would therefore hold that the FEIS does not satisfy NEPA with respect to the possible risks posed by human ingestion of the artificial snow.

III. Conclusion

I would hold that Appellants have proved violations of both the Religious Freedom Restoration Act and the National Environmental Policy Act. Of the two, the RFRA violation is by far the more serious. A NEPA violation can almost always be cured, and certainly could be cured in this case. However, the RFRA violation resulting from the proposed development of the Snowbowl is not curable. Because of the majority's decision today, there will be a permanent expansion of the Arizona Snowbowl. Up to 1.5 million gallons of treated sewage effluent per day will be sprayed on Humphrey's Peak for the foreseeable future.

The San Francisco Peaks have been at the center of religious beliefs and practices of Indian tribes of the Southwest since time out of mind. Humphrey's Peak, the holiest of the San Francisco Peaks, will from this time forward be desecrated and spiritually impure. In part, the majority justifies its holding on the ground that what it calls "public park land" is land that "belongs to everyone." Maj. op. at 10042. There is a tragic irony in this justification. The United States government took this land from the Indians by force. The majority now uses that forcible deprivation as a justification for spraying treated sewage effluent on the holiest of the Indians' holy mountains, and for re-

fusing to recognize that this action constitutes a substantial burden on the Indians' exercise of their religion.

RFRA was passed to protect the exercise of all religions, including the religions of American Indians. If Indians' land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be. I am truly sorry that the majority has effectively read American Indians out of RFRA.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15371

D.C. Nos. CV-05-01824-PGR
CV-05-01914-PGR
CV-05-01949-PGR
CV-05-01966-PGR

NAVAJO NATION; HAVASUPAI TRIBE; REX TILOUSI; DIANNA UQUALLA; SIERRA CLUB; WHITE MOUNTAIN APACHE NATION; YAVAPAI-APACHE NATION; THE FLAGSTAFF ACTIVIST NETWORK,

Plaintiffs-Appellants

and

HUALAPAI TRIBE; NORRIS NEZ; BILL BUCKY PRESTON; HOPI TRIBE; CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE; NORA RASURE, in her official capacity as Forest Supervisor, Responsible Officer, Coconino National Forest; HARV FORSGREN, appeal deciding office, Regional Forester, in his official capacity,

Defendants-Appellees,

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,

Defendant-intervenor-Appellee.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15371

D.C. Nos. CV-05-01824-PGR
CV-05-01914-PGR
CV-05-01949-PGR
CV-05-01966-PGR

NAVAJO NATION; HUALAPAI TRIBE; NORRIS NEZ; BILL BUCKY PRESTON; HAVASUPAI TRIBE; REX TILOUSI; DIANNA UQUALLA; SIERRA CLUB; WHITE MOUNTAIN APACHE NATION; YAVAPAI-APACHE NATION; CENTER FOR BIOLOGICAL DIVERSITY; THE FLAGSTAFF ACTIVIST NETWORK,

Plaintiffs,

and

HOPI TRIBE,

Plaintiffs-Appellant,

v.

UNITED STATES FOREST SERVICE; NORA RASURE, in her official capacity as Forest Supervisor, Responsible Officer, Coconino National Forest; HARV FORSGREN, appeal deciding office, Regional Forester, in his official capacity,

Defendants-Appellees,

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,
Defendant-intervenor-Appellee.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed March 12, 2007]

No. 06-15455
D.C. No.
CV-05-01824-PGR

HUALAPAI TRIBE; NORRIS NEZ; BILL BUCKY PRESTON
Plaintiffs-Appellants,

v.

UNITED STATES FOREST SERVICE; NORA RASURE, in her official capacity as Forest Supervisor, Responsible Officer, Coconino National Forest; HARV FORSGREN, appeal deciding office, Regional Forester, in his official capacity,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona Paul G. Rosenblatt,
District Judge, Presiding

Argued and Submitted
September 14, 2006—San Francisco, California

Before: William A. Fletcher and Johnnie B. Rawlinson, *Circuit Judges*, and Thelton E. Hendeson,* *District Judge*.

Opinion by Judge William A. Fletcher

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* The Honorable Thelton E. Henderson, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

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OPINION

W. FLETCHER, *Circuit Judge*:

The San Francisco Peaks in the Coconino National Forest in northern Arizona have long-standing religious significance to numerous Indian tribes of the American Southwest. The Arizona Snowbowl is a ski area on Humphrey's Peak, the highest and most religiously significant of the San Francisco Peaks. After preparing an Environmental Impact Statement, the United States Forest Service approved a proposed expansion of the Snowbowl's facilities. One component of the expansion would enable the Snowbowl to make artificial snow from recycled sewage effluent. Plaintiffs challenged the Forest Service's approval of the expansion under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*

After a bench trial, the district court held that the proposed expansion did not violate RFRA. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 907 (D. Ariz. 2006). At the same time, the district court granted summary judgment to the defendants on the plaintiffs' NEPA and NHPA claims. *Id.* at 872-80. This appeal followed as to all three claims.

Plaintiffs-appellants are the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the Yavapai-Apache Nation, the White Mountain Apache Nation, Bill Bucky Preston (of the Hopi Tribe), Norris Nez (of the Navajo Nation), Rex Tilousi (of the Havasupai Tribe), Dianna Uqualla (of the Havasupai Tribe), the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network. Defendants-appellees are the United States Forest Service; Nora Rasure, the Forest Supervisor; Harv Forsgren, the Regional Forester; and intervenor Arizona Snowbowl Resort Limited Partnership ("ASR"), the owner of the Snowbowl.

We reverse the decision of the district court in part. We hold that the Forest Service's approval of the Snowbowl's use of recycled sewage effluent to make artificial snow on the San Francisco Peaks violates RFRA, and that in one respect the Final Environmental Impact Statement prepared in this case does not comply with NEPA. We affirm the grant of summary judgment to Appellees on four of Appellants' five NEPA claims and their NHPA claim.

I. Background

Humphrey's Peak, Agassiz Peak, Doyle Peak, and Fremont Peak form a single large mountain commonly known as the San Francisco Peaks, or simply the Peaks. The Peaks tower over the desert landscape

of the Colorado Plateau in northern Arizona. At 12,633 feet, Humphrey's Peak is the highest point in the state. The Peaks are located within the 1.8 million acres of the Coconino National Forest.

In 1984, Congress designated 18,960 acres of the Peaks as the Kachina Peaks Wilderness. Arizona Wilderness Act of 1984, Pub. L. No. 98-406, § 101(a)(22), 98 Stat. 1485. The Forest Service has identified the Peaks as eligible for inclusion in the National Register of Historic Places and as a "traditional cultural property." A traditional cultural property is one "associat[ed] with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." National Register Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (rev. ed. 1998), *available at http://www.cr.nps.gov/nr/publications/bulletins/nrb38/*.

The Forest Service has described the Peaks as "a landmark upon the horizon, as viewed from the traditional or ancestral lands of the Hopi, Zuni, Acoma, Navajo, Apache, Yavapai, Hualapai, Havasupai, and Paiute." The Service has acknowledged that the Peaks are sacred to at least thirteen formally recognized Indian tribes, and that this religious significance is of centuries' duration. Though there are differences among these tribes' religious beliefs and practices associated with the Peaks, there are important commonalities. As the Service has noted, many of these tribes share beliefs that water, soil, plants, and animals from the Peaks have spiritual and medicinal properties; that the Peaks and everything on them form an indivisible living entity; that the Peaks are home to deities and other spirit beings; that

tribal members can communicate with higher powers through prayers and songs focused on the Peaks; and that the tribes have a duty to protect the Peaks.

Organized skiing has existed at the Arizona Snowbowl since 1938. The original lodge was destroyed by fire in 1952. A replacement lodge was built in 1956. A poma lift was installed in 1958, and a chair lift was installed in 1962. In 1977, the then-owner of the Snowbowl requested authorization to clear 120 acres of new ski runs and to do additional development. In 1979, after preparing an Environmental Impact Statement, the Forest Service authorized the clearing of 50 of the 120 requested acres, the construction of a new lodge, and some other development. An association of Navajo medicine men, the Hopi tribe, and two nearby ranch owners brought suit under, *inter alia*, the Free Exercise Clause of the First Amendment and NEPA. The D.C. Circuit upheld the Forest Service's decision. *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

The Snowbowl has always depended on natural snowfall. In dry years, the operating season is short, with few skiable days and few skiers. The driest year in recent memory was 2001-02, when there were 87 inches of snow, 4 skiable days, and 2,857 skiers. Another dry year was 1995-96, when there were 113 inches of snow, 25 skiable days, and 20,312 skiers. By contrast, in wet years, there are many skiable days and many skiers. For example, in 1991-92, there were 360 inches of snow, 134 skiable days, and 173,000 skiers; in 1992-93, there were 460 inches of snow, 130 skiable days, and 180,062 skiers; in 1997-98, there were 330 inches of snow, 115 skiable days, and 173,862 skiers; and in 2004-05, there were 460 inches of snow, 139 skiable days, and 191,317 skiers.

ASR, the current owner, purchased the Snowbowl in 1992 for $4 million. In September 2002, ASR submitted a facilities improvement proposal to the Forest Service. In February 2004, the Forest Service issued a Draft Environmental Impact Statement. A year later, in February 2005, the Forest Service issued a Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD"). The ROD approved "Alternative Two" of the FEIS, the alternative preferred by the Snowbowl. Under Alternative Two, a number of changes were proposed, including: an area for snow play and snow tubing would be developed; a new high-speed ski lift would be added; three existing lifts would be relocated and upgraded; 66 new acres of skiable terrain would be developed; 50 acres of trails would be re-contoured; a three-acre beginner's area would be re-contoured and developed; an existing lodge would be upgraded; and a new lodge would be built.

Alternative Two also included a proposal to make artificial snow using treated sewage effluent. Treated sewage effluent is wastewater discharged by households, businesses, and industry that has been treated for certain kinds of reuse. Under Alternative Two, the City of Flagstaff would provide the Snowbowl with up to 1.5 million gallons per day of its treated sewage effluent from November through February. A new 14.8-mile pipeline would be built between Flagstaff and the Snowbowl to carry the treated effluent. At the beginning of the ski season, during November and December, the Snowbowl would cover 205.3 acres of Humphrey's Peak with artificial snow to build a base layer. The Snowbowl would then make additional artificial snow as necessary during the rest of the season, depending on the amount of natural snow.

II. Standards of Review

Following a bench trial, we review the district court's conclusions of law *de novo* and its findings of fact for clear error. *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 843 (9th Cir. 2004).

We review *de novo* a grant of summary judgment. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 804 (9th Cir. 1999). Appellants bring their NEPA and NHPA claims under the Administrative Procedure Act ("APA"), which provides that courts shall "hold unlawful and set aside agency action, findings, and conclusions of law" that are either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

III. Religious Freedom Restoration Act

Under the Religious Freedom Restoration Act of 1993 ("RFRA"), the federal government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C. § 2000bb-1(a). "Exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A); *see also id.* § 2000cc-5(7)(B) (further specifying that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise"). Subsection (b) of § 2000bb-1 qualifies the ban on substantially burdening the free exercise of religion. It provides, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden

to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

These provisions of RFRA were prompted by two Supreme Court decisions. RFRA was originally adopted in response to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, an Oregon statute denied unemployment benefits to drug users, including Indians who used peyote in religious ceremonies. *Id.* at 890. The Court held that the First Amendment's Free Exercise Clause does not prohibit burdens on religious practices if they are imposed by laws of general applicability, such as the Oregon statute. Characterizing its prior cases striking down generally applicable laws as "hybrid" decisions invoking multiple constitutional interests, the Court refused to apply the "compelling government interest" test to a claim brought solely under the Free Exercise Clause. *Id.* at 881-82, 885-86. The Court acknowledged, however, that although the Constitution does not require a compelling interest test in such a case, legislation could impose one. *Id.* at 890.

In RFRA, enacted three years later, Congress made formal findings that the Court's decision in *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," and that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." Pub. L. No. 103-141, § 2(a), 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C. § 2000bb(a)). Congress declared that the pur-

poses of RFRA were "to provide a claim or defense to persons whose religious exercise is substantially burdened by government" and "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* § 2(b), 107 Stat. at 1488 (codified at 42 U.S.C. § 2000bb(b)). In this initial version of RFRA, adopted in 1993, Congress defined "exercise of religion" as "exercise of religion under the First Amendment to the Constitution." *Id.* § 5, 107 Stat. at 1489 (codified at 42 U.S.C. § 2000bb-2(4) (1994) (repealed)).

In 1997, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held RFRA unconstitutional as applied to state and local governments because it exceeded Congress's authority under § 5 of the Fourteenth Amendment. *Id.* at 529, 534-35. The Court did not, however, invalidate RFRA as applied to the federal government. *See Guam v. Guerrero*, 290 F.3d 1210, 1220-21 (9th Cir. 2002) (holding RFRA constitutional as applied to the federal government). Three years later, in response to *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc *et seq.*). RLUIPA prohibits state and local governments from imposing substantial burdens on the exercise of religion through prisoner or land-use regulations. 42 U.S.C. §§ 2000cc, 2000cc-1. In addition, RLUIPA replaced RFRA's original, constitution-based definition of "exercise of religion" with the broader definition quoted above. RLUIPA §§ 7-8, 114 Stat. at 806-07. Under RLUIPA, and under RFRA after its amendment by RLUIPA in 2000, "exercise of

religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4), 2000cc5(7)(A).

In several ways, RFRA provides greater protection for religious practices than did the Supreme Court's pre-*Smith* free exercise cases. First, as we have previously noted, RFRA "goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden': a government may burden religion only on the terms set out by the new statute." *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996) (as amended). *Cf.* U.S. Const. amd. 1 ("Congress shall make no law . . . prohibiting the free exercise [of religion]."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) ("The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring))).

Second, as the Supreme Court noted in *City of Boerne*, RFRA provides stronger protection for free exercise than the First Amendment did under the pre-*Smith* cases because "the Act imposes in every case a least restrictive means requirement — a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." 521 U.S. at 535.

Third, RFRA provides broader protection for free exercise because it applies *Sherbert*'s compelling interest test "in all cases" where the free exercise of religion is substantially burdened. 42 U.S.C. § 2000bb(b). Prior to *Smith*, the Court had refused to apply the compelling interest analysis in various contexts, ex-

empting entire classes of free exercise cases from such heightened scrutiny. *Smith*, 494 U.S. at 883 ("In recent years, we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all."); *see, e.g.*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (not applicable to prison regulations); *Bowen v. Roy*, 476 U.S. 693, 707 (1986) (Burger, J., for plurality) (not applicable in enforcing "facially neutral and uniformly applicable requirement for the administration of welfare programs"); *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (not applicable to military regulations).

Finally, and perhaps most important, Congress expanded the statutory protection for religious exercise in 2000 by amending RFRA's definition of "exercise of religion." Under the amended definition — "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" — RFRA now protects a broader range of religious conduct than the Supreme Court's interpretation of "exercise of religion" under the First Amendment. *See Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 995 n.21 (9th Cir. 2006) (noting same). To the extent that our RFRA cases prior to RLUIPA depended on a narrower definition of "religious exercise," those cases are no longer good law. *See, e.g.*, *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (burden must prevent adherent "from engaging in conduct or having a religious experience which the faith mandates" and must be "an interference with a tenet or belief that is central to religious doctrine" (quoting *Graham v. Comm'r*, 822 F.2d 844, 850-51 (9th Cir. 1987)); *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (no substantial burden because prisoner was not prevented from "engaging in any practices mandated by his religion"); *Goehring v. Brophy*, 94 F.3d

1294, 1299 (9th Cir. 1996) (plaintiffs failed to establish "a substantial burden on a central tenet of their religion"). The district court in this case therefore erred by disregarding the amended definition and requiring Appellants to prove that the proposed action would prevent them "from engaging in conduct or having a religious experience *which the faith mandates*." 408 F. Supp. 2d at 904 (quoting *Worldwide Church of God, Inc. v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000), decided before RLUIPA's passage) (emphasis added).

Even after RLUIPA, RFRA plaintiffs must prove that the burden on their religious exercise is "substantial." The burden must be "more than an 'inconvenience,' " *Guerrero*, 290 F.3d at 1222 (quoting *Worldwide Church of God*, 227 F.3d at 1121), and must prevent the plaintiff "from engaging in [religious] conduct or having a religious experience," *Bryant*, 46 F.3d at 949 (quoting *Graham*, 822 F.2d at 850-51). Thus, in addressing the tribes' RFRA claim we must answer the following questions: (1) What is the "exercise of religion" in which the tribal members engage with respect to the San Francisco Peaks? (2) What "burden," if any, would be imposed on that exercise of religion if the proposed expansion of the Snowbowl went forward? (3) If there is a burden, would the burden be "substantial"? (4) If there would be a substantial burden, can the "application of the burden" to the tribal members be justified as "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest"? We address these questions in turn.

A. "Exercise of Religion"

RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). The district court stated that it was not "challenging the honest religious beliefs of any witness." Nor do Appellees dispute the sincerity of Appellants' testimony concerning their religious beliefs and practices. Indeed, Appellees concede that the Peaks as a whole are significant to Appellants' "exercise of religion." We focus our analysis on the Peaks' significance to the Hopi and Navajo, and to a lesser extent on the Hualapai and Havasupai.

1. The Hopi

Hopi religious practices center on the Peaks. As stated by the district court, "The Peaks are where the Hopi direct their prayers and thoughts, a point in the physical world that defines the Hopi universe and serves as the home of the Kachinas, who bring water, snow and life to the Hopi people." 408 F. Supp. 2d at 894. The Hopi have been making pilgrimages to the Peaks since at least 1540, when they first encountered Europeans, and probably long before that.

The Hopi believe that when they emerged into this world, the clans journeyed to the Peaks (or *Nuvatukyaovi*, "high place of snow") to receive instructions from a spiritual presence, *Ma'saw*. At the Peaks, they entered a spiritual covenant with *Ma'saw* to take care of the land, before they migrated down to the Hopi villages. The Hopi re-enact their emergence from the Peaks annually, and Hopi practitioners look to the Peaks in their daily songs and prayers as a place of tranquility, sanctity, and purity.

The Peaks are also the primary home of the powerful spiritual beings called *Katsinam* (Hopi plural of *Katsina*, or Kachina in English). Hundreds of specific *Katsinam* personify the spirits of plants, animals, people, tribes, and forces of nature. The *Katsinam* are the spirits of Hopi ancestors, and the Hopi believe that when they die, their spirits will join the *Katsinam* on the Peaks. As spiritual teachers of "the Hopi way," the *Katsinam* teach children and remind adults of the moral principles by which they must live. These principles are embodied in traditional songs given by the *Katsinam* to the Hopi and sung by the Hopi in their everyday lives. One Hopi practitioner compared these songs to sermons, which children understand simplistically but which adults come to understand more profoundly. Many of these songs focus on the Peaks.

Katsinam serve as intermediaries between the Hopi and the higher powers, carrying prayers from the Hopi villages to the Peaks on an annual cycle. From July through January, the *Katsinam* live on the Peaks. In sixteen days of ceremonies and prayers at the winter solstice, the Hopi pray and prepare for the *Katsinam*'s visits to the villages. In February or March, the *Katsinam* begin to arrive, and the Hopi celebrate with nightly dances at which the *Katsinam* appear in costume and perform. The *Katsinam* stay while the Hopi plant their corn and it germinates. Then, in July, the Hopi mark the *Katsinam*'s departure for the Peaks.

The Hopi believe that pleasing the *Katsinam* on the Peaks is crucial to their livelihood. Appearing in the form of clouds, the *Katsinam* are responsible for bringing rain to the Hopi villages from the Peaks. The *Katsinam* must be treated with respect, lest they

refuse to bring the rains from the Peaks to nourish the corn crop. In preparation for the *Katsinam*'s arrival, prayer sticks and feathers are delivered to every member of the village, which they then deposit in traditional locations, praying for the spiritual purity to receive the *Katsinam*. The *Katsinam* will not arrive until the peoples' hearts are in the right place, a state they attempt to reach through prayers directed at the spirits on the Peaks.

The Hopi have at least fourteen shrines on the Peaks. Every year, religious leaders select members of each of the approximately 40 congregations, or *kiva*, among the twelve Hopi villages to make a pilgrimage to the Peaks. They gather from the Peaks both water for their ceremonies and boughs of Douglas fir worn by the *Katsinam* in their visits to the villages.

2. The Navajo

The Peaks are also of fundamental importance to the religious beliefs and practices of the Navajo. The district court found, "[T]he Peaks are considered . . . to be the 'Mother of the Navajo People,' their essence and their home. The whole of the Peaks is the holiest of shrines in the Navajo way of life." 408 F. Supp. 2d at 889. Considering the mountain "like family," the Navajo greet the Peaks daily with prayer songs, of which there are more than one hundred relating to the four mountains sacred to the Navajo. Witnesses described the Peaks as "our leader" and "very much an integral part of our life, our daily lives."

The Navajo creation story revolves around the Peaks. The mother of humanity, called the Changing Woman and compared by one witness to the Virgin Mary, resided on the Peaks and went through pu-

berty there, an event which the people celebrated as a gift of new life. Following this celebration, called the *kinaalda*, the Changing Woman gave birth to twins, from whom the Navajo are descended. The Navajo believe that the Changing Woman's *kinaalda* gave them life generation after generation. Young women today still celebrate their own *kinaalda* with a ceremony one witness compared to a Christian confirmation or a Jewish bat mitzvah. The ceremony sometimes involves water especially collected from the Peaks because of the Peaks' religious significance.

The Peaks are represented in the Navajo medicine bundles found in nearly every Navajo household. The medicine bundles are composed of stones, shells, herbs, and soil from each of four sacred mountains. One Navajo practitioner called the medicine bundles "our Bible," because they have "embedded" within them "the unwritten way of life for us, our songs, our ceremonies." The practitioner traced their origin to the Changing Woman: When her twins wanted to find their father, Changing Woman instructed them to offer prayers to the Peaks and conduct ceremonies with medicine bundles.

The Navajo believe that the medicine bundles are conduits for prayers; by praying to the Peaks with a medicine bundle containing soil from the Peaks, the prayer will be communicated to the mountain.

As their name suggests, medicine bundles are also used in Navajo healing ceremonies, as is medicine made with plants collected from the Peaks. Appellant Norris Nez, a Navajo medicine man, testified that "like the western doctor has his black bag with needles and other medicine, this bundle has in there the things to apply medicine to a patient." Explaining why he loves the mountain as his mother, he testi-

fied, "She is holding medicine and things to make us well and healthy. We suckle from her and get well when we consider her our Mother." Nez testified that he collects many different plants from the Peaks to make medicine.

The Peaks play a role in every Navajo religious ceremony. The medicine bundle is placed to the west, facing the Peaks. In the Blessingway ceremony, called by one witness "the backbone of our ceremony" because it is performed at all ceremonies' conclusion, the Navajo pray to the Peaks by name.

The purity of nature, including the Peaks, plays an important part in Navajo beliefs. Among other things, it affects how a medicine bundle — described by one witness as "a living basket" — is made. The making of a medicine bundle is preceded by a four-day purification process for the medicine man and the keeper of the bundle. By Navajo tradition, the medicine bundle should be made with leather from a buck that is ritually suffocated; the skin cannot be pierced by a weapon. Medicine bundles are "rejuvenated" regularly, every few years, by replacing the ingredients with others gathered on pilgrimages to the Peaks and three other sacred mountains.

The Navajo believe their role on earth is to take care of the land. They refer to themselves as *nochoka dine*, which one witness translated as "people of the earth" or "people put on the surface of the earth to take care of the lands." They believe that the Creator put them between four sacred mountains of which the westernmost is the Peaks, or *Do'ok'oos-liid* ("shining on top," referring to its snow), and that the Creator instructed them never to leave this homeland. Although the whole reservation is sacred to the Navajo, the mountains are the most sacred part. One witness

drew an analogy to a church, with the area within the mountains as the part of the church where the people sit, and the Peaks as "our altar to the west."

As in Hopi religious practice, the Peaks are so sacred in Navajo beliefs that, as testified by Joe Shirley, Jr., President of the Navajo Nation, a person "cannot just voluntarily go up on this mountain at any time. It's — it's the holiest of shrines in our way of life. You have to sacrifice. You have to sing certain songs before you even dwell for a little bit to gather herbs, to do offerings." After the requisite preparation, the Navajo go on pilgrimages to the Peaks to collect plants for ceremonial and medicinal use.

3. The Hualapai

The Peaks figure centrally in the beliefs of the Hualapai. The Hualapai creation story takes place on the Peaks. The Hualapai believe that at one time the world was deluged by water, and the Hualapai put a young girl on a log so that she could survive. She landed on the Peaks, alone, and washed in the water. In the water, she conceived a son, who was a man born of water. She washed again, and conceived another son. These were the twin warriors or war gods, from whom the Hualapai are today descended. Later, one of the twins became ill, and the other collected plants and water from the Peaks, thereby healing his brother. From this story comes the Hualapai belief that the mountain and its water and plants are sacred and have medicinal properties. One witness called the story of the deluge, the twins, and their mother "our Bible story" and drew a comparison to Noah's ark. As in Biblical parables and stories, Hualapai songs and stories about the twins are infused with moral principles.

Hualapai spiritual leaders travel to the Peaks to deliver prayers. Like the Hopi and the Navajo, the Hualapai believe that the Peaks are so sacred that one has to prepare oneself spiritually to visit. A spiritual leader testified that he prays to the Peaks every day and fasts before visiting to perform the prayer feather ceremony. In the prayer feather ceremony, a troubled family prays into an eagle feather for days, and the spiritual leader delivers it to the Peaks; the spirit of the eagle then carries the prayer up the mountain and to the creator.

The Hualapai collect water from the Peaks. Hualapai religious ceremonies revolve around water, and they believe water from the Peaks is sacred. In their sweat lodge purification ceremony, the Hualapai add sacred water from the Peaks to other water, and pour it onto heated rocks to make steam. In a healing ceremony, people seeking treatment drink from the water used to produce the steam and are cleansed by brushing the water on their bodies with feathers. At the conclusion of the healing ceremony, the other people present also drink the water. A Hualapai tribal member who conducts healing ceremonies testified that water from the Peaks is used to treat illnesses of "high parts" of the body like the eyes, sinuses, mouth, throat, and brain, including tumors, meningitis, forgetfulness, and sleepwalking. He testified that the Peaks are the only place to collect water with those medicinal properties, and that he travels monthly to the Peaks to collect it from Indian Springs, which is lower on the mountain and to the west of the Snowbowl. The water there has particular significance to the Hualapai because the tribe's archaeological sites are nearby.

In another Hualapai religious ceremony, when a baby has a difficult birth, a Hualapai spiritual leader brings a portion of the placenta to the Peaks so that the child will be strong like the twins and their mother in the Hualapai creation story. The Hualapai also grind up ponderosa pine needles from the Peaks in sacred water from the Peaks to aid women in childbirth.

A Hualapai religious law forbids mixing the living and the dead. In testimony in the district court, a spiritual leader gave the example of washing a baby or planting corn immediately after taking part in a death ceremony. Mixing the two will cause a condition that was translated into English as "the ghost sickness." The leader testified that purification after "touching death" depends on the intensity of the encounter. If he had just touched the dead person's clothes or belongings, he might be purified in four days, but if he touched a body, it would require a month.

4. The Havasupai

The Peaks are similarly central to the beliefs of the Havasupai, as the Forest Service has acknowledged in the FEIS: "The Hualapai and the Havasupai perceive the world as flat, marked in the center by the San Francisco Peaks, which were visible from all parts of the Havasupai territory except inside the Grand Canyon. The commanding presence of the Peaks probably accounts for the Peaks being central to the Havasupai beliefs and traditions, even though the Peaks themselves are on the edge of their territory." The Chairman of the Havasupai testified that the Peaks are the most sacred religious site of the Havasupai: "That is where life began." The Havasupai believe that when the earth was submerged in

water, the tribe's "grandmother" floated on a log and landed and lived on the Peaks, where she survived on water from the Peaks' springs and founded the tribe.

Water is central to the religious practices of the Havasupai. Although they do not travel to the Peaks to collect water, Havasupai tribal members testified that they believe the water in the Havasu creek that they use in their sweat lodges comes ultimately from the Peaks, to which they pray daily. They believe that spring water is a living, life-giving, pure substance, and they do not use tap water in their religious practices. They perform sweat lodge ceremonies, praying and singing as they use the spring water to make steam; they believe that the steam is the breath of their ancestors, and that by taking it into themselves they are purified, cleansed, and healed. They give water to the dead to take with them on their journey, and they use it to make medicines. The Havasupai also gather rocks from the Peaks to use for making steam.

B. "Burden"

The proposed expansion of the Snowbowl entails depositing millions of gallons of treated sewage effluent — often euphemistically called "reclaimed water" — from the City of Flagstaff onto the Peaks. Depending on weather conditions, substantially more than 100 million gallons of effluent could be deposited over the course of the winter ski season.

Before treatment, the raw sewage consists of waste discharged into Flagstaff's sewers by households, businesses, and industry. The FEIS describes the treatment performed by Flagstaff:

> In the primary treatment stage, solids settle out as sludge . . . . Scum and odors are also removed

> . . . . Wastewater is then gravity-fed for secondary treatment through the aertion/denitrification process, where biological digestion of waste occurs . . . . in which a two-stage anoxic/aerobic process removes nitrogen, suspended solids, and [digestible organic matter] from the wastewater. The secondary clarifiers remove the by-products generated by this biological process, recycle microorganisms back into the process from return activated sludge, and separate the solids from the waste system. The waste sludge is sent to [a different plant] for treatment. The water for reuse then passes through the final sand and anthracite filters prior to disinfection by ultraviolet light radiation . . . . Water supplied for reuse is further treated with a hypochlorite solution to assure that residual disinfection is maintained . . . .

Although the treated sewage effluent would satisfy the requirements of Arizona law for "reclaimed water," the FEIS explains that the treatment does not produce pure water: "Fecal coliform bacteria, which are used as an indicator of microbial pathogens, are typically found at concentrations ranging from 105 to 107 colony-forming units per 100 milliliters (CFU/100 ml) in untreated wastewater. Advanced wastewater treatment may remove as much as 99.9999+ percent of the fecal coliform bacteria; however, the resulting effluent has detectable levels of enteric bacteria, viruses, and protazoa, including Cryptosporidium and Giardia." According to Arizona law, the treated sewage effluent must be free of "detectable fecal coliform organisms" in only "four of the last seven daily reclaimed water samples." Ariz. Admin. Code § R18-11-303(B)(2)(a). The FEIS acknowledges that the treated sewage effluent also contains "many uniden-

tified and unregulated residual organic contaminants."

Treated sewage effluent may be safely and beneficially used for many purposes. *See id.* § R18-11-309 Tbl. A (2005) (permitting its use for, *inter alia*, irrigating food crops and schoolyards; flushing toilets; fire protection; certain commercial air conditioning systems; and non-self-service car washes); 7 Ariz. Admin. Reg. 876 (Feb. 16, 2001) ("Water reclamation is an important strategy for conserving and augmenting Arizona's drinking water supply. Source substitution, or the reuse of reclaimed water to replace potable water that currently is used for nonpotable purposes, conserves higher quality sources of water for human consumption and domestic purposes."). However, the Arizona Department of Environmental Quality ("ADEQ") requires that users take precautions to avoid human ingestion. For example, users must "place and maintain signage . . . so the public is informed that reclaimed water is in use and that no one should drink from the system." Ariz. Admin. Code § R1 8-9-704(H) (2005). Irrigation users must employ "application methods that reasonably preclude human contact with reclaimed water," including preventing "contact with drinking fountains, water coolers, or eating areas," and preventing the treated effluent from "standing on open access areas during normal periods of use." *Id.* § R18-9- 704(F). Arizona law prohibits uses involving "full-immersion water activity with a potential of ingestion," and "evaporative cooling or misting." *Id.* § R1 8-9-704(G)(2).

Under the proposed action challenged in this case, up to 1.5 million gallons per day of treated sewage effluent would be sprayed on the mountain from No-

vember through February. In November and December, the Snowbowl would use it to build a base layer of artificial snow over 205.3 acres of Humphrey's Peak. The Snowbowl would then spray more as necessary depending on the amount of natural snowfall. The proposed action also involves constructing a reservoir on the mountain with a surface area of 1.9 acres to hold 10 million gallons of treated sewage effluent. The stored effluent would allow snowmaking to continue after Flagstaff cuts off the supply at the end of February.

The ADEQ approved the use of treated sewage effluent for snowmaking in 2001, noting that four other states already permitted its use for that purpose. 7 Ariz. Admin. Reg. 880 (Feb. 16, 2001). However, the Snowbowl would be the first ski resort in the nation to make its snow entirely from undiluted treated sewage effluent. The Snowbowl's general manager testified in the district court that no other resort in the country currently makes its artificial snow "exclusively" out of undiluted sewage effluent.

Appellants claim that the use of treated sewage effluent to make artificial snow on the Peaks would substantially burden their exercise of religion. Because Appellants' religious beliefs and practices are not uniform, the precise burdens on religious exercise vary among the Appellants. Nevertheless, the burdens fall roughly into two categories: (1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated — physically, spiritually, or both — for sacramental use; and (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's

purity or a spiritual connection to the mountain that would be undermined by the contamination.

The first burden — the contamination of natural resources necessary for the performance of certain religious ceremonies — has been acknowledged and described at length by the Forest Service. The FEIS summarizes: "Snowmaking and expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of these tribes." Further, "the use of reclaimed water is believed by the tribes to be impure and would have an irretrievable impact on the use of the soil, plants, and animals for medicinal and ceremonial purposes throughout the entire Peaks, as the whole mountain is regarded as a single, living entity."

Three Navajo practitioners' testimony at the bench trial echoed the Forest Service's assessment in describing how the proposed action would prevent them from performing various ceremonies. Larry Foster, a Navajo practitioner who is training to become a medicine man, testified that "once water is tainted and if water comes from mortuaries or hospitals, for Navajo there's no words to say that that water can be reclaimed." He further testified that he objected to the current use of the Peaks as a ski area, but that using treated sewage effluent to make artificial snow on the Peaks would be "far more serious." He explained, "I can live with a scar as a human being. But if something is injected into my body that is foreign, a foreign object — and reclaimed water, in my opinion, could be water that's reclaimed through sewage, wastewater, comes from mortuaries, hospitals, there could be disease in the waters — and that would be

like injecting me and my mother, my grandmother, the Peaks, with impurities, foreign matter that's not natural."

Foster testified that if treated sewage effluent were used on the Peaks he would no longer be able to go on the pilgrimages to the Peaks that are necessary to rejuvenate the medicine bundles, which are, in turn, a part of every Navajo healing ceremony. He explained:

> Your Honor, our way of life, our culture we live in — we live in the blessingway, in harmony. We try to walk in harmony, be in harmony with all of nature. And we go to all of the sacred mountains for protection. We go on a pilgrimage similar to Muslims going to Mecca. And we do this with so much love, commitment and respect. And if one mountain — and more in particularly with the San Francisco Peaks — which is our bundle mountain, or sacred, bundle mountain, were to be poisoned or given foreign materials that were not pure, it would create an imbalance — there would not be a place among the sacred mountains. We would not be able to go there to obtain herbs or medicines to do our ceremonies, because that mountain would then become impure. It would not be pure anymore. And it would be a devastation for our people.

Appellant Navajo medicine man Norris Nez testified that the proposed action would prevent him from practicing as a medicine man. He told the district court that the presence of treated sewage effluent would "ruin" his medicine, which he makes from plants collected from the Peaks. He also testified that he would be unable to perform the fundamental Blessing-way ceremony, because "all [medicine] bun-

dles will be affected and we will have nothing to use eventually."

Foster, Nez, and Navajo practitioner Steven Begay testified that because they believe the mountain is an indivisible living entity, the entire mountain would be contaminated even if the millions of gallons of treated sewage effluent are put onto only one area of the Peaks. According to Foster, Nez, and Begay, there would be contamination even on those parts of the Peaks where the effluent would not come into physical contact with particular plants or ceremonial areas. To them, the contamination is not literal in the sense that a scientist would use the term. Rather, the contamination represents the poisoning of a living being. In Foster's words, "[I]f someone were to get a prick or whatever from a contaminated needle, it doesn't matter what the percentage is, your whole body would then become contaminated. And that's what would happen to the mountain." In Nez's words, "All of it is holy. It is like a body. It is like our body. Every part of it is holy and sacred." In Begay's words, "All things that occur on the mountain are a part of the mountain, and so they will have connection to it. We don't separate the mountain."

The Hualapai also presented evidence that the proposed action would prevent them from performing particular religious ceremonies. Frank Mapatis, a Hualapai practitioner and spiritual leader who visits the Peaks approximately once a month to collect water for ceremonies and plants for medicine, testified that the use of treated sewage effluent would prevent him from performing Hualapai sweat lodge and healing ceremonies with the sacred water from the Peaks. Mapatis testified that he believes that the treated sewage effluent would seep into the ground and into

the spring below the Snowbowl where he collects his sacred water, so that the spring water would be "contaminated" by having been "touched with death." Because contact between the living and the dead induces "ghost sickness," which involves hallucinations, using water touched with death in healing ceremonies "would be like malpractice." Further, Mapatis would become powerless to perform the healing ceremony for ghost sickness itself, because that ceremony requires water from the Peaks, the only medicine for illnesses of the upper body and head, like hallucinations.

The second burden the proposed action would impose — undermining Appellants' religious faith, practices, and way of life by desecrating the Peaks' purity — is also shown in the record. The Hopi presented evidence that the presence of treated sewage effluent on the Peaks would fundamentally undermine all of their religious practices because their way of life, or "beliefway," is largely based on the idea that the Peaks are a pure source of their rains and the home of the *Katsinam*.

Leigh Kuwanwisiwma, a Hopi religious practitioner and the director of the tribe's Cultural Preservation Office, explained the connection between contaminating the Peaks and undermining the Hopi religion:

> The spiritual covenant that the Hopi clans entered into with the Caretaker I refer to as Ma'saw, the spiritual person and the other d[ei]ties that reside — and the Katsina that reside in the Peaks started out with the mountains being in their purest form. They didn't have any real intrusion by humanity.

> The purity of the spirits, as best we can acknowledge the spiritual domain, we feel were content in receiving the Hopi clans. So when you begin to intrude on that in a manner that is really disrespectful to the Peaks and to the spiritual home of the Katsina, it affects the Hopi people. It affects the Hopi people, because as clans left and embarked on their migrations and later coming to the Hopi villages, we experienced still a mountain and peaks that were in their purest form as a place of worship to go to, to visit, to place our offerings, the tranquility, the sanctity that we left a long time ago was still there.

Antone Honanie, a Hopi practitioner, testified that he would have difficulty preparing for religious ceremonies, because treated sewage effluent is "something you can't get out of your mind when you're sitting there praying" to the mountain, "a place where everything is supposed to be pure." Emory Sekaquaptewa, a Hopi tribal member and research anthropologist, testified that the desecration of the mountain would cause *Katsinam* dance ceremonies to lose their religious value. They would "simply be a performance for performance['s] sake" rather than "a religious effort": "Hopi people are raised in this belief that the mountains are a revered place. And even though they begin with kind of a fantasy notion, this continues to grow into a more deeper spiritual sense of the mountain. So that any thing that interrupts this perception, as they hold it, would tend to undermine the — the integrity in which they hold the mountain."

Summarizing the Hopi's testimony, the district court wrote:

> The individual Hopi's practice of the Hopi way permeates every part and every day of the indi-

> vidual's life from birth to death. . . . The Hopi Plaintiffs testified that the proposed upgrades to the Snowbowl have affected and will continue to negatively affect the way they think about the Peaks, the Kachina and themselves when preparing for any religious activity involving the Peaks and the Kachina — from daily morning prayers to the regular calendar of religious dances that occur throughout the year. . . . The Hopi Plaintiffs also testified that this negative effect on the practitioners' frames of mind due to the continued and increased desecration of the home of the Kachinas will undermine the Hopi faith and the Hopi way. According to the Hopi, the Snowbowl upgrades will undermine the Hopi faith in daily ceremonies and undermine the Hopi faith in their Kachina ceremonies as well as their faith in the blessings of life that they depend on the Kachina to bring.

408 F. Supp.2d at 894-95.

The Havasupai presented evidence that the presence of treated sewage effluent on the Peaks would, by contaminating the Peaks, undermine their sweat lodge purification ceremonies and could lead to the end of the ceremonies. Rex Tilousi, Chairman of the Havasupai, testified that Havasupai religious stories teach that the water in Havasu creek, which they use for their sweat ceremonies, flows from the Peaks, where the Havasupai believe life began. Although none of the three Havasupai witnesses stated that they would be completely unable to perform the sweat lodge ceremonies as a consequence of the impurity introduced by the treated sewage effluent, Roland Manakaja, a traditional practitioner, testified that the impurity would disrupt the ceremony:

> If I was to take the water to sprinkle the rocks to bring the breath of our ancestors — we believe the steam is the breath of our ancestors. And the rocks placed in the west signify where our ancestors go, the deceased. . . . Once the steam rises, like it does on the Peaks, the fog or the steam that comes off is creation. And once the steam comes off and it comes into our being, it purifies and cleanses us and we go to the level of trance. . . . It's going to impact mentally my spirituality. Every time I think about sprinkling that water on the rocks, I'm going to always think about this sewer that they're using to recharge the aquifer.

He further testified that he was "concerned" that the water's perceived impurity might cause the sweat lodge ceremony to die out altogether, if tribal members fear "breathing the organisms or the chemicals that may come off the steam."

C. "Substantial Burden" on the "Exercise of Religion"

To establish a prima facie case under RFRA, a plaintiff must show that the government's proposed action imposes a substantial burden on the plaintiff's ability to practice freely his or her religion. *Guerrero*, 290 F.3d at 1222. Although the burden need not concern a religious practice that is "compelled by, or central to, a system of religious belief," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), the burden "must be more than an 'inconvenience,' " *Guerrero*, 290 F.3d at 1222 (quoting *Worldwide Church of God*, 227 F.3d at 1121). The burden must prevent the plaintiff "from engaging in [religious] conduct or having a religious experience." *Bryant*, 46 F.3d at 949 (quoting *Graham*, 822 F.2d at 850-51).

The record supports the conclusion that the proposed use of treated sewage effluent on the San Francisco Peaks would impose a burden on the religious exercise of all four tribes discussed above — the Navajo, the Hopi, the Hualapai, and the Havasupai. However, on the record before us, that burden falls most heavily on the Navajo and the Hopi. The Forest Service itself wrote in the FEIS that the Peaks are the most sacred place of both the Navajo and the Hopi; that those tribes' religions have revolved around the Peaks for centuries; that their religious practices require pure natural resources from the Peaks; and that, because their religious beliefs dictate that the mountain be viewed as a whole living being, the treated sewage effluent would in their view contaminate the natural resources throughout the Peaks. Navajo Appellants presented evidence in the district court that, were the proposed action to go forward, contamination by the treated sewage effluent would prevent practitioners from making or rejuvenating medicine bundles, from making medicine, and from performing the Blessingway and healing ceremonies. Hopi Appellants presented evidence that, were the proposed action to go forward, contamination by the effluent would fundamentally undermine their entire system of belief and the associated practices of song, worship, and prayer, that depend on the purity of the Peaks, which is the source of rain and their livelihoods and the home of the *Katsinam* spirits.

We conclude that Appellants have shown that the use of treated sewage effluent on the Peaks would impose a substantial burden on their exercise of religion. This showing is particularly strong for the Navajo and the Hopi. Because we hold that the Navajo and the Hopi have shown a substantial burden on

their exercise of religion, we need not reach the somewhat closer question of whether the Hualapai and the Havasupai have also done so.

D. "Compelling Governmental Interest" and "Least Restrictive Means"

The Forest Service and the Snowbowl argue that even if Appellants have shown a substantial burden on their religious exercise, approving the use of treated sewage effluent to make artificial snow at a commercial ski area is "in furtherance of a compelling governmental interest" and constitutes "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

The Supreme Court has recently emphasized that, even with respect to governmental interests of the highest order, a "categorical" or general assertion of a compelling interest is not sufficient. In *Gonzales v. O Centro Espirita Beneficente*, 126 S. Ct. 1211 (2006), the Court held under RFRA that the government's general interest in enforcing the Controlled Substances Act was insufficient to justify the substantial burden on religious exercise imposed on a small religious group by a ban on a South American hallucinogenic plant. *Id.* at 1220-21. The Court stated that it did not "doubt the general interest in promoting public health and safety . . . , but under RFRA invocation of such general interests, standing alone, is not

enough." *Id.* at 1225. "[S]trict scrutiny 'at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim.' " *Id.* at 1221 (quoting *Smith*, 494 U.S. at 899 (O'Connor, J., concurring in the judgment)).

The Forest Service and the Snowbowl argued successfully in the district court, and argue here, that approving the use of treated sewage effluent to make artificial snow serves several compelling governmental interests. In the words of the district court, those compelling interests are: (1)"selecting the alternative that best achieves [the Forest Service's] multiple-use mandate under the National Forest Management Act," which includes "managing the public land for recreational uses such as skiing"; (2) protecting public safety by "authorizing upgrades at Snowbowl to ensure that users of the National Forest ski area have a safe experience"; and (3) complying with the Establishment Clause. 408 F. Supp. 2d at 906. The district court concluded that all three were compelling governmental interests and that approving the proposed action was "the least restrictive means for achieving [the government's] land management decision." *Id.* at 907. Before this court, the Forest Service argues that the first two interests are compelling. The Snowbowl argues that all three are compelling. We disagree. We take the proffered interests in turn.

First, the Forest Service's interests in managing the forest for multiple uses, including recreational skiing, are, in the words of the Court in *O Centro Espirita*, "broadly formulated interests justifying the general applicability of government mandates" and are therefore insufficient on their own to meet RFRA's compelling interest test. 126 S. Ct. at 1220. Appellants argue that approving the proposed action serves

the more particularized compelling interest in providing skiing at the Snowbowl, because the use of artificial snow will allow a more "reliable and consistent operating season" at one of the only two major ski areas in Arizona, where public demand for skiing and snowplay is strong. We are unwilling to hold that authorizing the use of artificial snow at an already functioning commercial ski area in order to expand and improve its facilities, as well as to extend its ski season in dry years, is a governmental interest "of the highest order." *Yoder*, 406 U.S. at 215.

However, Appellees contend that the very survival of the Arizona Snowbowl as a commercial ski area depends on their being able to make artificial snow with treated sewage effluent. They point to the district court's statement that "the evidence adduced at trial demonstrates that snowmaking is needed to maintain the viability of the Snowbowl as a public recreational resource." 408 F. Supp. 2d at 907. The record does not support the conclusion that the Snowbowl will necessarily cease to exist as a ski area if the proposed expansion does not go forward. As we noted above, there were two very dry years in 1995-96 and 2001-02. But in other recent years there has been heavy snowfall, particularly in 1991-91, 1992-93, 1997-98, and 2004-05. Relying only on natural snowfall, the Snowbowl has been in operation since 1938, and it undertook a substantial expansion in 1979. The current owners purchased the Snowbowl in 1992 for $4 million and now seek approval for another substantial expansion. It is clear that the current owners expect that the resort would be substantially more profitable — and the income stream more consistent — if the expansion were allowed to proceed. But the evidence in the record does not support a conclusion that the Snowbowl will necessarily go

out of business if it is required to continue to rely on natural snow and to remain a relatively small, low-key resort. The current owners may or may not decide to continue their ownership. But a sale by the current owners is not the same thing as the closure of the Snowbowl.

Even if there is a substantial threat that the Snowbowl will close entirely as a commercial ski area, we are not convinced that there is a compelling *governmental* interest in allowing the Snowbowl to make artificial snow from treated sewage effluent to avoid that result. We are struck by the obvious fact that the Peaks are located in a desert. It is (and always has been) predictable that some winters will be dry. The then-owners of the Snowbowl knew this when they expanded the Snowbowl in 1979, and the current owners knew this when they purchased it in 1992. The current owners now propose to change these natural conditions by adding treated sewage effluent. Under some circumstances, such a proposal might be permissible or even desirable. But in this case, we cannot conclude that authorizing the proposed use of treated sewage effluent is justified by a compelling governmental interest in providing public recreation. Even without the proposed expansion of the Snowbowl, members of the public will continue to enjoy many recreational activities on the Peaks. Such activities include the downhill skiing that is now available at the Snowbowl. Even if the Snowbowl were to close (which we think is highly unlikely), continuing recreational activities on the Peaks would include "motorcross, mountain biking, horseback riding, hiking and camping," as well as other snow-related activities such as cross-country skiing, snowshoeing, and snowplay. 408 F. Supp. 2d at 884.

Second, although the Forest Service undoubtedly has a general interest in ensuring public safety on federal lands, there has been no showing that approving the proposed action advances that interest. Appellees provide no specific evidence that skiing at the Snowbowl in its current state is unsafe. We do recognize that there is a legitimate safety concern about snowplay by non-skiers who drive to the Peaks and park beside the road. The district court found that such snowplay next to the road has caused "injuries, traffic management issues, garbage, and sanitation problems." *Id.* at 899. The court further found that the proposed action would address the problem by creating an off-road managed snowplay area as part of the Snowbowl complex. *Id.* But this safety concern is not a compelling interest that can justify the burden imposed by the Snowbowl's expansion. The current dangerous conditions caused by snowplay do not result from the operation of the Snowbowl. These conditions are not caused by skiers, but rather by non-skiers who have stopped along the road. The Snowbowl's proposed expansion and the creation of a snow play area at the Snowbowl have become linked only because the Forest Service insisted in the negotiations leading to the FEIS that, in return for approval of the proposed action, the Snowbowl agrees to create a snowplay area for non-skiers. Even assuming that the safety concerns motivating the creation of the snowplay area are a compelling interest, we do not agree that inducing a commercial ski resort, which is not the source of the danger, to develop a snowplay area as a quid pro quo for approval of the resort's use of treated sewage effluent is the least restrictive means of furthering that interest.

Third, approving the proposed action does not serve a compelling governmental interest in avoiding

conflict with the Establishment Clause. The Supreme Court has repeatedly held that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.* (citations omitted); *see also Hobbie v. Unemp. App. Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."). Declining to allow a commercial ski resort in a national forest to put treated sewage effluent on a sacred mountain is an accommodation that, in our view, falls far short of an Establishment Clause violation. Indeed, the Forest Service does not argue that avoiding a conflict with the Establishment Clause is a compelling interest served by the proposed action. Only the Snowbowl makes that argument.

In support of its argument, the Snowbowl cites *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), in which the Supreme Court struck down a statute allowing all Sabbath observers "an absolute and unqualified right not to work on whatever day they designate as their Sabbath," because the law's primary effect was to advance religion by "impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates." *Id.* at 709. The Snowbowl argues that holding for Appellants would absolutely privilege Appellants' religious beliefs and practices over all other interests. This is not the case.

The district court found, and the evidence in the record supports, that Appellants believe that "the presence of the Snowbowl desecrates the mountain," regardless of the use of treated sewage effluent. Indeed, representatives of several of the tribes brought an unsuccessful First Amendment Free Exercise challenge to the 1979 expansion of the Snowbowl on that basis. *Wilson v. Block*, 708 F.2d 735, 739-45 (D.C. Cir. 1983). In Appellants' view, the proposed action, including the use of treated sewage effluent, would only "*further* desecrate their sacred mountain." 408 F. Supp. 2d at 888 (emphasis added). Absolutely valuing Appellants' religious beliefs over all other interests would require shutting down the existing operation of the Snowbowl — an option that was not considered as one of the three main alternatives in the FEIS and is not now sought by Appellants. In our view, declining to authorize the use of treated sewage effluent on the Peaks does not absolutely vindicate Appellants' interests. Rather, such a refusal is a permitted accommodation to avoid "callous indifference." *Lynch*, 465 U.S. at 673.

We therefore hold that Appellees have not demonstrated that approving the proposed action serves a compelling governmental interest by the least restrictive means.

E. *Lyng v. Northwest Indian Cemetery Protection Association*

Appellees rely heavily on perceived similarities between this case and *Lyng v. Northwest Indian Cemetery Assoc'n*, 485 U.S. 439 (1988), to argue that the proposed action does not violate RFRA. In *Lyng*, the Forest Service sought to build a six-mile section of road connecting two pre-existing roads in the Chimney Rock area of the Six Rivers National Forest in

northern California. *Id.* at 442. This area had historically been used by several Indian tribes for religious purposes. The route selected for the road was "removed as far as possible from the sites used by contemporary Indians for specific spiritual activities." *Id.* at 443. "Alternative routes . . . were rejected because they would have required the acquisition of private land, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians." *Id.*

Plaintiffs, including an Indian organization and several individual tribal members, challenged the proposed road under the Free Exercise Clause of the First Amendment, contending that their religious practices required use of undisturbed "prayer seats" in the Chimney Rock area. *Id.* at 443, 453. In their words, " 'Prayer seats are oriented so there is an unobstructed view, and the practitioner must be surrounded by *undisturbed* naturalness.'" *Id.* at 453 (emphasis added by the Court). The Court was willing to "assume that the threat to the efficacy of at least some religious practices [posed by the proposed road] is extremely grave." *Id.* at 451. The Court nonetheless held that building the proposed road did not violate the Free Exercise Clause. In the Court's view, there was no principled basis for distinguishing the plaintiffs' suit from a suit in which tribal members "might seek to exclude all human activity but their own from sacred areas of the public lands." *Id.* at 452-53.

For two reasons, *Lyng* does not control the result in this case. First, the plaintiffs' challenge in *Lyng* was brought directly under the Free Exercise Clause. As we discuss, *supra*, the standard that must be satisfied to justify a burden on the exercise of religion un-

der RFRA is significantly more demanding than the standard under the Free Exercise Clause. Most importantly, "exercise of religion" is defined more broadly under RFRA than "free exercise" under the First Amendment. Further, the test for a prima facie case under RFRA is whether there is a "substantial burden" on the exercise of religion, whereas the traditional test under the First Amendment is whether free exercise is "prohibited." Finally, RFRA adds a "least restrictive means" requirement to the traditional compelling governmental interest test under the Free Exercise Clause. The net effect of these changes is that it is easier for a plaintiff to prevail in a RFRA case than in a pure free exercise case.

Second, the facts in *Lyng* were materially different from those in this case. In *Lyng*, the Court was unable to distinguish the plaintiffs' claim from one that would have required the wholesale exclusion of non-Indians from the land in question. Further, the government had made significant efforts to reduce the burden, locating the planned road so as to reduce as much as possible its auditory and visual impacts. The Court wrote, "Except for abandoning its project entirely, and thereby leaving the two existing segments of road to dead-end in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous." *Id.* at 454. Finally, the failure to build the six-mile segment of road would have left the unconnected portions of the road virtually useless.

By contrast, Appellants in this case do not seek to prevent use of the Peaks by others. A developed commercial ski area already exists, and Appellants do not seek to interfere with its current operation. There are many other recreational uses of the Peaks,

with which Appellants also do not seek to interfere. Far from "seek[ing] to exclude all human activity but their own from sacred areas of the public lands," *id.* at 542-53, Appellants in this case are not seeking to exclude any of the extensive human activity that now takes place on the Peaks. The currently proposed expansion of the Snowbowl may reasonably be seen as part of a continuing course of development begun in 1938 and continued in 1979. The equivalent in this case to "abandoning the project entirely" in *Lyng* would be abandoning the ski area altogether. The equivalent of the Forest Service's minimizing the adverse impact of the road in *Lyng* by carefully choosing its location would be minimizing the adverse impact of the Snowbowl by restricting its operation to that which can be sustained by natural snowfall.

The record in this case establishes the religious importance of the Peaks to the Appellant tribes who live around it. From time immemorial, they have relied on the Peaks, and the purity of the Peaks' water, as an integral part of their religious beliefs. The Forest Service and the Snowbowl now propose to put treated sewage effluent on the Peaks. To get some sense of equivalence, it may be useful to imagine the effect on Christian beliefs and practices — and the imposition that Christians would experience — if the government were to require that baptisms be carried out with "reclaimed water."

The Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place. We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff

can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred.

F. Conclusion

For the foregoing reasons, we conclude that Appellants prevail on their RFRA claim.

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IV. National Environmental Policy Act

The National Environmental Protection Act requires federal agencies to prepare a detailed environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This requirement "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and that "relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Appellants assert five NEPA claims. We hold that only the first of them merits reversal. We consider each in turn.

A. Human Ingestion of Snow Made from Treated Sewage Effluent

The Navajo Nation, the White Mountain Apache Tribe, the Yavapai-Apache Tribe, the Havasupai Tribe, Rex Tilousi, Dianna Uqualla, the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network ("Navajo Appellants" or "Appellants") claim that the FEIS failed to consider adequately the risks posed by human ingestion of artificial snow made from treated sewage effluent.

1. Administrative Exhaustion and Notice of Claim in the District Court

We begin by addressing Appellees' argument that we should not reach the merits of this claim. Appellees argue that Appellants failed to exhaust the claim

in administrative proceedings as required by the APA, 5 U.S.C. § 704, and that Appellants failed to raise it in the district court. We conclude that Appellants sufficiently raised the claim in comments on the draft EIS and in their administrative appeals, and that they properly raised it in the district court.

We have interpreted the NEPA exhaustion requirements leniently because "[r]equiring more might unduly burden those who pursue administrative appeals unrepresented by counsel, who may frame their claims in non-legal terms." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002). "The plaintiffs have exhausted their administrative appeals if the appeal, taken as a whole, provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged." *Id.* at 899; *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (plaintiffs' participation must " 'alert[ ] the agency to the parties' position and contentions,' in order to allow the agency to give the issue meaningful consideration" (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)). "Claims must be raised with sufficient clarity to allow the decision maker to understand and rule on the issue raised, but there is no bright-line standard as to when this requirement has been met and we must consider exhaustion arguments on a case-by-case basis." *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002). The aim is to prevent plaintiffs from engaging in "unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the

ground that the agency failed to consider matters 'forcefully presented.'" *Vt. Yankee*, 435 U.S. at 553-54.

The core of Appellants' claim is that the FEIS has insufficiently analyzed the risk of ingestion — particularly by children — of artificial snow made from treated sewage effluent. This risk was evident to the Forest Service from the beginning. At least from the standpoint of public relations, the Service responded to the risk at a very early stage. In October 2002, even before the draft EIS was published, the Service wrote what it called a "strategic talking point." The "talking point" began with the question: "Will my kids get sick if they eat artificial snow made from treated wastewater?" It continued with a scripted answer: "[T]his question is really one that will be thoroughly answered in the NEPA analysis process." As we discuss below, the question was *not* subsequently "thoroughly answered in the NEPA analysis process."

Appellants were among those who raised this issue, both in comments on the draft EIS and in administrative appeals. One member of both the Sierra Club and the Flagstaff Activist Network commented that "we'll be dealing with treated sewage that is undiluted with fresh water and people who will be falling in great frozen piles of the stuff and probably accidentally swallowing some. Not to speak of children and even adults who indulge in the winter tradition of eating snow." A member of the Sierra Club and the Center for Biological Diversity noted that "various disturbing trends have led researchers to believe that environmental exposures are contributing to children's declining health status": "If concerns about wildlife and adult human health are not sufficient to justify prudence in the further contamination of the northern Arizona Ecosystems and waters with vari-

ous societal chemicals, then perhaps concerns for child health might dictate a more conservative approach."

Further, the Navajo Nation, the Sierra Club, the Flagstaff Activist Network, the Center for Biological Diversity, and the Hualapai Tribe objected in their administrative appeal:

> The Forest Service never asked for interagency consultation on this matter from any substantial government authority including the National Institute of Child Health . . . . Children respond very differently from adults to drugs and pollutants. Moreover, different genetic make-ups respond differently to drugs and chemicals. No data at all exist on the long-term effects of reclaimed water pollutants on two major populations that can be impacted by the "preferred alternative," children and Native Americans.

In their administrative appeal, the Havasupai protested that "[k]ids and skiers will be getting a mouthful of [the water]."

These comments and appeals were more than sufficient to put the Forest Service on notice of the claim and to exhaust Appellants' administrative remedies. The Forest Service was obviously aware, from the outset of the NEPA process, of possible health risks from human ingestion of artificial snow made from treated sewage effluent, and Appellants were among those who gave the Service reason to address the issue.

The Appellants' complaint in the district court satisfied the notice pleading requirement of Federal Rule of Civil Procedure 8(a)(2) with respect to the risk of ingesting snow, and the risk to children was

specifically briefed in the district court at summary judgment.

2. Merits

"NEPA 'does not mandate particular results,' but 'simply provides the necessary process' to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Robertson*, 490 U.S. at 350). Regulations require that an EIS discuss environmental impacts "in proportion to their significance." 40 C.F.R. § 1502.2(b). For impacts discussed only briefly, there should be "enough discussion to show why more study is not warranted." *Id.*

We employ a " 'rule of reason [standard] to determine whether the [EIS] contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.' " *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (first alteration in original) (quoting *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1071 (9th Cir. 2002)). In reviewing an EIS, a court must not substitute its judgment for that of the agency, but rather must uphold the agency decision as long as the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953-54 (9th Cir. 2003) (quoting *Wash. Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1990)). This standard consists of "a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *Churchill County v. Norton*, 276 F.3d

1060, 1071 (9th Cir. 2001) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

The treated sewage effluent proposed for use in making artificial snow meets ADEQ standards for what Arizona calls "A+ reclaimed water." The ADEQ permits use of A+ reclaimed water for snowmaking, but it has specifically disapproved human ingestion of such water. Arizona law requires users of reclaimed water to "place and maintain signage at locations [where the water is used] so the public is informed that reclaimed water is in use and that no one should drink from the system." Ariz. Admin. Code § R18-9-704(H) (2005). Human consumption, "full-immersion water activity with a potential of ingestion," and "evaporative cooling or misting" are all prohibited. *Id.* § R18-9-704(G)(2). Irrigation users must employ "application methods that reasonably preclude human contact," including preventing "contact with drinking fountains, water coolers, or eating areas," and preventing the treated effluent from "standing on open access areas during normal periods of use." *Id.* § R18-9-704(F).

We conclude that the FEIS does not contain a reasonably thorough discussion of the risks posed by possible human ingestion of artificial snow made from treated sewage effluent, and does not articulate why such discussion is unnecessary.

The main body of the FEIS addresses the health implications of using treated sewage effluent in subchapter 3H, "Watershed Resources." Much of the subchapter's analysis focuses on the "hydrogeologic setting" and on the effect of the artificial snow once it has melted. The part of the subchapter describing the treated sewage effluent acknowledges that its risks to human health are not well known because it contains

unregulated contaminants in amounts not ordinarily found in drinking water, including prescription drugs and chemicals from personal care products. The subchapter contains tables listing the amounts of various organic and inorganic chemical constituents that have been measured in the treated sewage effluent. One table gives a partial comparison of Flagstaff's monitoring data on the treated sewage effluent to the national drinking water standards, showing that Flagstaff has not measured thirteen of the regulated contaminants and has not measured five of them with sufficient precision to determine whether the treated sewage effluent meets the standards. However, the FEIS does not go on to discuss either the health risks resulting from ingestion of the treated sewage effluent, or the likelihood that humans — either adults or children — will in fact ingest the artificial snow.

Instead, the environmental impact analysis in subchapter 3H, the only part of the FEIS to discuss the characteristics of treated sewage effluent, addresses only the impact on the watersheds and aquifers. That analysis assesses the treated sewage effluent's impact after it has filtered through the ground, a process the FEIS estimates may result in "an order of magnitude decrease in concentration of solutes." Thus, although the subchapter reasonably discusses the human health risks to downgradient users, it does not address the risks entailed in humans' direct exposure to, and possible ingestion of, undiluted treated sewage effluent that has not yet filtered through the ground.

Appellees direct our attention to five responses to comments on the draft EIS, contained in the second volume of the FEIS. None of these brief responses

constitutes a reasonable discussion of the issue, nor does any response articulate why such a discussion is unnecessary. The first response, objecting to a commenter's use of the word "sewage" in advocating a "sewage-free natural environment," notes that groundwater tainted by effluent in southern California has not been shown to have had adverse human health effects. That response does not address the risk posed by this project: that is, direct exposure to, and possible ingestion of, snow made from undiluted treated sewage effluent.

A second response purports to answer a question about who would bear liability for illnesses caused by the treated sewage effluent. The response states that the treated sewage effluent is "very strictly controlled," "acceptable for unrestricted body contact," and "authorized for artificial snowmaking for skiing by ADEQ." Not only does the response fail to answer the liability question posed; the response also fails to address the fact that the ADEQ has specifically disapproved human ingestion of treated sewage effluent.

The third response is to a question about why warning signs are necessary if the reclaimed water is not harmful. The FEIS states, hypothetically: "The extent to which reclaimed water is or is not a human health and safety concern would depend on many factors . . . . Poorly or partially treated wastewater could give rise to infectious disease. On the other hand, it is technically and economically feasible to treat wastewater to acceptable drinking water quality." As above, this is a nonresponsive answer. While it may be true that "it is technically and economically feasible" to treat wastewater to the point where it meets drinking water standards, the fact in this case is that the treated sewage effluent proposed for use is *not*

treated to meet standards for potable water. The FEIS then explains that the signs are required under Arizona law: "In direct response to the comment, it should be realized that there are many sites in Arizona where a lower quality of reclaimed water is used for irrigation. The law protects the public (e.g., golfers and farm workers) in the hot desert regions that might otherwise believe the water is potable."

This response does not address the risk that children or adults might also think the snow may be ingested. Further, in referring to the need to guard against ingestion of "lower quality" reclaimed water, the answer implies (incorrectly) that the artificial snow would be made of potable water.

The fourth response follows three combined questions: (1) whether signs would be posted to warn that "reclaimed water" has been used to make the artificial snow; (2) how much exposure to the snow would be sufficient to make a person ill; and (3) how long it would take to see adverse effects on plants and animals downstream. The response to these questions is four sentences long. It states that signs would be posted, but it does not say how numerous or how large the signs would be. It then summarizes the treatment the sewage would undergo. The final sentence asserts: "In terms of microbiological and chemical water quality, the proposed use of reclaimed water for snowmaking represents a low risk of acute or chronic adverse environmental impact to plants, wildlife, and humans." The response does not answer the specific and highly relevant question: How much direct exposure to the artificial snow is safe? Nor does the response provide any analysis of the extent of the likely "exposure," including the likelihood that children or adults would accidentally or intentionally in-

gest the snow made from non-potable treated sewage effluent.

The fifth response is on the last page of responses to comments. The Forest Service in its brief does not call attention to this response, perhaps because the Service recognizes its inadequacy. The questions and response are:

> **In areas where reclaimed water is presently used, there are signs posted to warn against consumption of the water. Will these signs be posted at the Snowbowl? If so, how will that keep children from putting snow in there [sic] mouths or accidentally consuming the snow in the case of a wreck?**
>
> There will be signs posted at Snowbowl informing visitors of the use of reclaimed water as a snowmaking water source. Much like areas of Flagstaff where reclaimed water is used, it is the responsibility of the visitor or the minor's guardian to avoid consuming snow made with reclaimed water. It is important to note that machine-produced snow would be mixed and therefore diluted with natural snow decreasing the percentage of machine-produced snow within the snowpack. *Because ADEQ approved the use of reclaimed water, it is assumed different types of incidental contact that could potentially occur from use of class A reclaimed water for snowmaking were fully considered.*

(Emphasis added.)

There are several problems with this response. First, the response does not assess the risk that children will eat the artificial snow. Stating that it is the parents' responsibility to prevent their children from

doing so neither responds to the question whether signs would prevent children from eating snow, nor addresses whether ingesting artificial snow would be harmful. Second, the Forest Service's assumption that the ADEQ's approval means the snow must be safe for ingestion is inconsistent with that same agency's regulations, which are designed to *prevent* human ingestion. Third, the assumption that the ADEQ actually analyzed the risk of skiers ingesting the treated sewage effluent snow is not supported by any evidence in the FEIS (or elsewhere in the administrative record). Finally, the Forest Service's answer is misleading in stating that the treated sewage effluent will be "diluted." The artificial snow would itself be made entirely from treated sewage effluent and would only be "mixed and therefore diluted" with natural snow insofar as the artificial snow intermingles with a layer of natural snow. During a dry winter, there may be little or no natural snow with which to "dilute" the treated sewage effluent.

In addition to directing our attention to the responses above, Appellees further contend that the FEIS "sets forth relevant mitigation measures" to "the possibility that someone may ingest snow." Although Appellees do not specify the "relevant mitigation measures" to which they refer, the only mitigation measure mentioned in the FEIS is the requirement under Arizona law that the Snowbowl post signs "so the public is informed that reclaimed water is in use and that no one should drink from the system." Ariz. Admin. Code § R18-9- 704(H) (2005). This "mitigation measure" is *not* listed along with the fifty-five mitigation measures catalogued in a table in the FEIS. *Cf.* 40 C.F.R. § 1502.14 (f) (requiring agencies to include "appropriate mitigation measures" in the EIS's description of the proposal and its alterna-

tives). The measure's omission from the FEIS table is hardly surprising, however, given that the FEIS does not address as an environmental impact the risk to human health from the possible ingestion of artificial snow made from treated sewage effluent.

Our role in reviewing the FEIS under the APA is not to second-guess a determination by the Forest Service about whether artificial snow made from treated sewage effluent would be ingested and, if so, whether such ingestion would threaten human health. We are charged, rather, with evaluating whether the FEIS contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Ctr. for Biological Diversity*, 349 F.3d at 1166 (quotation marks omitted). An agency preparing an EIS is required to take a "hard look" that "[a]t the least . . . encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail." *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005) (citing *Robertson*, 490 U.S. at 350 (stating that NEPA requires environmental costs to be "adequately identified and evaluated")). A proper NEPA analysis will "foster both informed decisionmaking and informed public participation." *Churchill*, 276 F.3d at 1071 (quoting *Block*, 690 F.2d at 761).

We conclude that the Forest Service has not provided a "reasonably thorough discussion" of any risks posed by human ingestion of artificial snow made from treated sewage effluent or articulated why such a discussion is unnecessary, has not provided a "candid acknowledgment" of any such risks, and has not provided an analysis that will "foster both informed

decision-making and informed public participation." We therefore hold that the FEIS does not satisfy NEPA with respect to the risks of ingesting artificial snow.

B. Consideration of Alternatives

Appellants Norris Nez, Bill "Bucky" Preston, and the Hualapai Tribe ("Hualapai Appellants" or "Appellants") claim that the Forest Service failed to consider a reasonable range of alternatives in the FEIS. They claim that the range of alternatives falls short because the Forest Service took actions that foreclosed considering other alternatives, and because the Service failed to consider the alternative of drilling for fresh water.

NEPA provides that an EIS must contain a discussion of "alternatives to the proposed action," and that federal agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(C)(iii), (E). This requirement is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14.

Project alternatives derive from an EIS's "Purpose and Need" section, which briefly specifies "the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." *Id.* § 1502.13. "The stated goal of a project necessarily dictates the range of 'reasonable' alternatives and an agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-bythe-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) Federal agencies must present the environmental impacts of the proposal in com-

parative form, "[r]igorously explore and objectively evaluate all reasonable alternatives," and "briefly discuss" the reasons for eliminating any alternatives from detailed study. 40 C.F.R. § 1502.14(a). "The rule of reason guides both the choice of alternatives as well as the extent to which the EIS must discuss each alternative." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004) (alteration and internal punctuation omitted).

The regulations further provide that "[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1502.2(f); *see also id.* § 1506.1. An EIS "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." *Id.* § 1502.2(g). However, agencies shall also "[i]dentify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference." *Id.* § 1502.14(e). We have interpreted this regulation to mean that "an agency can formulate a proposal or even identify a preferred course of action before completing an EIS." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1185 (9th Cir. 1997).

The FEIS and ROD define the Proposed Action's "Purpose and Need" as follows:

> Purpose #1
>
> *To ensure a consistent and reliable operating season, thereby maintaining the economic viability of the Snowbowl, and stabilizing employment levels and winter tourism within the local community.*

. . . .

Purpose #2:

To improve safety, skiing conditions, and recreational opportunities, bringing terrain and infrastructure into balance with current use levels.

The district court upheld this statement of purpose and need because it responds to documented needs and because it fits with both the forest plan for the Coconino National Forest and the Forest Service's multiple-use mandate. 408 F. Supp. 2d at 873-74. Although Appellants note that an agency does not have unlimited discretion to define the purpose and need for a project, they do not appeal this ruling.

Rather, the Hualapai Appellants argue that certain prescoping memoranda and notes demonstrate that the Forest Service took actions that foreclosed the consideration of a reasonable range of alternatives. They largely base their argument on the scripted "Key Messages" contained in the Forest Service's June 2002 "Tribal Consultation Plan":

> 1. We [the Forest Service] think it's a good idea, and we already know you [tribes] don't approve of it, but Snowbowl is there & isn't going away.
>
> . . . .
>
> 6. Upgrade can't be done without snowmaking
>
> 7. Recycled water IS clean, disease-free.
>
> 8. How can YOU help US make it work???

Appellants argue that another June 2002 talking points memorandum also supports the notion that the adoption of the proposed action was predetermined, quoting part of the scripted response contained in the memorandum: "Once we accept the proposal, we DO support it . . . ." Further, they point to a

note from a Forest Service meeting in August 2002, before the Snowbowl had officially submitted its proposal: "[W]e are all ambassadors of this [project] and need to provide the same messages."

Despite what these scripted responses written early in the process suggest, the balance of the administrative record sufficiently demonstrates that the Forest Service had not foreclosed all consideration of alternatives. Among the five "objectives" listed in the Tribal Consulation Plan are "Get ideas on possible mitigating measures" and "Are there any additional tribal concerns we don't already know about." The full sentence from the other talking points memorandum indicates that the Forest Service had not settled on any particular proposal: "Once we accept the proposal, we DO support it — That's why we want your input now so hopefully we can have a proposal we can all work with." The Forest Service was entitled to have in mind a preferred course of action in advance, *see Ass'n of Pub. Agency Customers*, 126 F.3d at 1185, and Appellants are unable to point to substantial evidence indicating that the Forest Service impermissibly "*commit[ted] resources* prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1502.2(f) (emphasis added).

Appellants also argue that the Forest Service failed adequately to consider fresh water drilling as an alternative to the use of treated sewage effluent for snowmaking. The Forest Service (but not the Snowbowl) argues that the doctrine of exhaustion bars this claim because Appellants did not raise the issue during the comment period or in their administrative appeal. The record contradicts the Forest Service. In his administrative appeal, Appellant Preston argued that the FEIS was inadequate because "an alterna-

tive was suggested for the use of freshwater instead of reclaimed water for snowmaking, but was summarily dismissed."

Appellants concede that the FEIS briefly addresses multiple alternatives to using the treated sewage effluent. They object, however, that the Forest Service relied on the Snowbowl's studies on the feasibility of water alternatives without conducting sufficient independent investigation and without disclosing sufficient information to the public to challenge the Snowbowl's studies. They further argue that the Forest Service's "assertions regarding economic and technical difficulties are questionable given the exorbitantly high costs ($19,733,000) and the technical difficulty of the selected alternative." To the contrary, the fact the Snowbowl is apparently willing to incur such costs supports the Forest Service's conclusion that the alternative sources of water were not reasonable. In justifying its elimination of the potable water alternative, the Forest Service cited "logistical and economic considerations and water availability research," as well as "environmental and political issues." Appellants have not shown that a fresh water alternative was reasonable in the middle of the northern Arizona desert, and that the relatively brief treatment in the FEIS was therefore inadequate. Thus, although the Forest Service's discussion was indeed brief, Appellants have not shown that the discussion was inadequate under 40 C.F.R. § 1502.14(a).

C. Disclosure of Scientific Viewpoints

The Navajo Appellants claim that the Forest Service failed to discuss and consider adequately the scientific viewpoint of Dr. Paul Torrence. Dr. Torrence criticized the draft EIS for approving the proposal de-

spite the risks posed by endocrine-disrupting chemicals present in treated sewage effluent.

Regulations require an agency preparing an FEIS to "assess and consider comments both individually and collectively," to respond to the comments, and to state its responses in the FEIS. 40 C.F.R. § 1503.4(a). Although the agency need not "set forth at full length the views with which it disagrees," *Block*, 690 F.2d at 773, the agency must "discuss at appropriate points in the [FEIS] any responsible opposing view which was not adequately discussed in the draft statement." 40 C.F.R. § 1502.9(b). Ordinarily, the agency must attach to the FEIS "all substantive comments . . . whether or not the comment is thought to merit individual discussion." *Id.* § 1503.4(b). However, if comments have been "exceptionally voluminous," summaries suffice. *Id.* Under some circumstances, an agency's response to a comment need not be given in the main body of the FEIS and may instead be contained in a separate "comments and responses" section. Those circumstances arise when "many of the critical comments prompted revisions in the body, [the agency] discussed in the body all of the environmental problems to which the comments were addressed, and [the agency] provided thoughtful and well-reasoned responses to most of the critical comments." *Ore. Natural Res. Council v. Marsh*, 832 F.2d 1489, 1498-99 (9th Cir. 1987) (as amended), *rev'd on other grounds*, 490 U.S. 360 (1989).

In *Center for Biological Diversity*, we held that an FEIS was inadequate because it failed "to disclose responsible scientific opposition to the conclusion upon which it [was] based." 349 F.3d at 1160. The FEIS in that case evaluated amendments to a forest management plan, prompted by the need to protect the

habitat of the northern goshawk. *Id.* at 1160-61. The alternatives evaluated were all based upon the scientific conclusion that the birds were "habitat generalists." *Id.* at 1160. The agency received comments from multiple federal and state agencies citing studies indicating that the birds were not habitat generalists, and that therefore the proposed plans would be inadequate. *Id.* at 1162-63. The agency responded to the comments directly via letter, but did not disclose or respond to them specifically in the FEIS. *Id.* at 1161- 62. Rather, the FEIS merely acknowledged in a summary comment that "[a] few commenters expressed concern that the proposed standards and guidelines for the . . . northern goshawk are grossly inadequate to protect the birds," and responded that "[t]he guidelines have been developed over several years using the best information and scientific review available" and could "easily be updated through future amendments." *Id.* at 1163 (alterations in original, quotation marks omitted). We held that the Forest Service was required to disclose and respond to the comments in the FEIS itself, because the comments were undisputedly "responsible opposing scientific viewpoints," and because the FEIS's recommendations undisputedly "rest[ed] upon the Service's habitat generalist conclusion." *Id.* at 1167.

The FEIS in this case is unlike the FEIS in *Center for Biological Diversity*. The comments of Dr. Torrence alleged by Appellants to have been inadequately treated in the FEIS do not represent an undisclosed opposing viewpoint to which the Forest Service failed to respond openly in the FEIS. Appellants object to the district court's characterization of Dr. Torrence's comments as "all . . . variations of the same allegation: that the agency failed to fully consider the range of implications of endocrine disrup-

tors." 408 F. Supp.2d at 877. They assert that Dr. Torrence's comments raise a broader set of issues that the FEIS fails to disclose and discuss. Yet the district court's characterization is accurate because Dr. Torrence's comments all concern endocrine disruptors.

The FEIS discloses, discusses, and responds to the substance of Dr. Torrence's comments. The main body of the FEIS contains a subsection on endocrine disruptors that cites a range of research and discusses the growing scientific and governmental concern about their effects on wildlife, humans, and the environment. The FEIS also discloses and discusses studies done on endocrine disruptors in the treated sewage effluent proposed for use in this case. The FEIS contains a table listing the amounts of suspected disruptors measured in the water and briefly summarizes a study of its effect on various animals in experiments conducted by a Northern Arizona University professor, Dr. Catherine Propper. The FEIS comments that the concentrations of the suspected endocrine disruptors are significantly lower in the Rio de Flag water than in other waste water also measured in the study, and that "the proposed use of reclaimed water for snowmaking . . . will not result in comparable environmental exposure as investigated by Dr. Propper." Thus, although the FEIS takes a more sanguine view of the risk than does Dr. Torrence, the main body of the FEIS discloses to the public, and makes clear that the Forest Service considered, the risk posed by endocrine disruptors.

D. Impact on the Regional Aquifer

The Navajo Appellants claim that the FEIS inadequately considers the environmental impact of diverting the treated sewage effluent from Flagstaff's re-

gional aquifer. The Forest Service argues that this claim was not exhausted in the administrative process. We disagree. Several comments raised the issue of diverting water that would have gone into the regional aquifer, including a comment by the Center for Biodiversity and the Flagstaff Activist Network, as well as a lengthy analysis submitted by the Sierra Club. Appellants' administrative appeal explicitly incorporated and reasserted by reference the submissions of these organizations. Thus, "taken as a whole," their appeal "provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged." *Native Ecosystems Council*, 304 F.3d at 899.

On the merits, Appellants claim that the FEIS inadequately considers the environmental impact of diverting the treated sewage effluent wastewater from the aquifer. Currently, during the winter when there is little demand for "reclaimed water" for irrigation and other uses, the treated sewage effluent is pumped into the Rio de Flag, where it is diluted with fresh water and percolates into the underground regional aquifer. Much of the effluent used to make artificial snow would eventually make its way back to the aquifer, but some water would be lost to sublimation and evaporation. The FEIS contains extensive analysis on the question of the impact of this water loss on the recharge of the regional aquifer; subchapter 3H, discussed above, is largely devoted to the subject.

Nevertheless, Appellants argue that the FEIS does not adequately address the cumulative impact on the aquifer caused by diverting the water. First, they argue that the analysis is inadequate because the FEIS states that the study area of the watershed analysis

is limited to the Hart Prairie Watershed and the Agassiz Subwatershed, an area that does not include the location where the treatment plant discharges the treated sewage effluent into the Rio de Flag. Therefore, they argue, the analysis fails to consider the impact on the regional aquifer caused by diverting the effluent from the Rio de Flag. However, the analysis of environmental impacts is plainly not limited to the designated "study area." Immediately after describing the parameters of the "study area" for the watershed analysis, the FEIS identifies as one of the cumulative effects to be analyzed the "potential long-term effects on the regional aquifer from diversions of reclaimed water for snowmaking."

Second, Appellants argue that the FEIS is inadequate, because the Forest Service "refused" to consider the impact of the wastewater diversion. They point to two portions of the FEIS that do, indeed, disclaim responsibility for analyzing the impact on the regional aquifer. The FEIS states that, due to an Arizona Supreme Court decision holding that cities can sell wastewater, "the authority of the city to provide reclaimed water to the Snowbowl is not subject to decision by the Forest Service and is therefore not within the jurisdictional purview of this analysis." In the comments and responses portion of the FEIS, the Forest Service reiterates, "The City has the legal right to put the reclaimed water to any reasonable use they see fit and is the responsible entity to determine the most suitable and beneficial use of reclaimed water."

Nevertheless, the FEIS contains some analysis of the environmental impact of the diversion on the regional aquifer. After stating that the issue "extends well beyond the scope of the EIS" and "is provided as

general information but will not be specifically considered in selecting an alternative," the Forest Service provides a quantitative analysis concluding that the snowmaking would "result in an estimated net aver-age reduction in groundwater recharge to the regional aquifer of . . . . slightly less than two percent of the City of Flagstaff' s total annual water production." Ultimately, the FEIS concludes that the cumulative impact is "negligible for overall change in aquifer recharge." Despite the odd and backhanded way in which it is presented, we conclude that the analysis in the FEIS is a "reasonably thorough discussion" of the issue. *Ctr. for Biological Diversity*, 349 F.3d at 1166.

E. Social and Cultural Impacts

The Hopi Appellants argue that the FEIS inadequately analyzes the social and cultural impacts of the proposed action on the Hopi people. NEPA requires agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." 42 U.S.C. § 4332(2)(A). Agencies must "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." *Id.* § 4332(2)(B). Finally, agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C). The regulations define "human environment" broadly to "include the natural and physical environment and the relationship of people with that environment," and

note that "[w]hen an [EIS] is prepared and economic or social and natural or physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment." 40 C.F.R. § 1508.14. The "effects" that should be discussed include "aesthetic, historic, cultural, economic, social, or health" effects, "whether direct, indirect, or cumulative." *Id.* § 1508.8.

The FEIS addresses the "human environment" through lengthy discussions of the relationship of the Hopi and others to the San Francisco Peaks and the impact of the proposed action on those relationships. The FEIS acknowledges that "it is difficult to be precise in the analysis of the impact of the proposed undertaking on the cultural and religious systems on the Peaks, as much of the information stems from oral histories and a deep, underlying belief system of the indigenous peoples involved." Nevertheless, the FEIS makes clear that the Forest Service conducted an extensive analysis of the issue, drawing from existing literature and extensive consultation with the affected tribes. The FEIS describes at length the religious beliefs and practices of the Hopi and the Navajo and the "irretrievable impact" the proposal would likely have on those beliefs and practices. The Forest Service has thus satisfied its obligations under NEPA to discuss the effects of the proposed action on the human environment.

F. Conclusion

For the foregoing reasons, we hold that the FEIS was inadequate with respect to its discussion of the risks posed by possible human ingestion of artificial snow made from treated sewage effluent. We hold that the FEIS was adequate in the four other respects challenged.

V. National Historic Preservation Act

If a proposed undertaking will have an effect on historic properties to which Indian tribes attach religious and cultural significance, the National Historic Preservation Act ("NHPA") requires the federal agency to consult with the affected tribes before proceeding. *See* 16 U.S.C. §§ 470a(d)(6), 470f; 36 C.F.R. §§ 800.1 *et seq.* Under NHPA regulations, "[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them." 36 C.F.R. § 800.16(f).

The Hopi Appellants argue that the Forest Service did not meaningfully consult with them. They concede that the Forest Service "sought tribal consultation on the religious and cultural significance of the Peaks, and provided a reasonable opportunity for the tribes to participate in the process," but they assert that those consultations were meaningless because the Forest Service prejudged the matter.

The evidence proffered by the Hopi Appellants does not support their claim. Their primary evidence is a letter from the Forest Service to the tribe. The Hopi Appellants contend that the letter shows that the proposal ultimately approved in the FEIS was preordained. The letter informs the Hopi that the owner of the Snowbowl is working on a draft proposal, states that the Forest Service believes the Hopi should be involved in the development of this proposal, and asks for input on "how the interests and concerns of the Hopi people might best be addressed" before the Forest Service accepts the proposal.

The Hopi Appellants specifically object to the following paragraph in the letter:

> The proposed development of the Arizona Snowbowl was the subject of a bitter lawsuit in 1981. Hopefully by involving the Hopi Tribe in planning the development this time, we can all avoid expensive and time-consuming litigation. However, the result of the 1981 lawsuit was a legal decision that allows the development of the Arizona Snowbowl and the construction of a number of facilities. The Snowbowl now wishes to complete the development, and it is important to stress that the scope of the proposal, with a few exceptions, is within the concept approved by the court decision. It is also important to note that all facilities will stay within the permitted area.

They argue that this letter "informed [them] at the outset that, based on its incorrect reading of an earlier court decision (apparently referring to *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983)), the Forest Service had no discretion to disapprove the development proposed by the Snowbowl, thus making the Proposed Action a foregone conclusion."

The Hopi Appellants' interpretation misconstrues the Forest Service's letter. The letter indicates that most but not all of the proposal is within the scope of the 1979 decision — the "few exceptions" include snowmaking. Hence the letter specifically notes that the Snowbowl intends to introduce new components never addressed in *Wilson*, thus implying that the Forest Service need not accept the proposal. This implication is supported by the letter's suggestion that consultation might avoid a court battle. Thus, while the Forest Service's letter signals receptiveness to the Snowbowl's proposal, it does not demonstrate that the Forest Service failed to meaningfully consult with the Hopi.

The Hopi also incorporate by reference the evidence that the Hualapai presented in their argument discussed above that the Forest Service took actions that foreclosed the consideration of a reasonable range of alternatives. However, because of the extensive record of consultation undertaken by the Forest Service in this case, we agree with the district court that "[a]lthough the consultation process did not end with a decision the tribal leaders supported, this does not mean that the Forest Service's consultation process was substantively and procedurally inadequate." 408 F. Supp. 2d at 879 n.11; *see also id.* at 879-80 & n.11 (describing the scope of the consultations in detail).

VI. Conclusion

In sum, we reverse the district court on two grounds. First, we hold that the Forest Service's approval of the proposed expansion of the Snowbowl, including the use of treated sewage effluent to make artificial snow, violates RFRA. Second, we hold that the Forest Service's FEIS does not fulfill its obligations under NEPA because it neither reasonably discusses the risks posed by the possibility of human ingestion of artificial snow made from treated sewage effluent nor articulates why such discussion is unnecessary. We affirm the district court's grant of summary judgment on Appellants' remaining four NEPA claims and on their NHPA claim.

AFFIRMED in part, REVERSED in part, and REMANDED. The parties shall bear their own costs on appeal.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 05-1824-PCT-PGR
CV 05-1914-PCT-EHC
CV 05-1949-PCT-NVW
CV 05-1966-PCT-JAT
(consolidated)

THE NAVAJO NATION, *et al.*
Plaintiffs,

v.

U.S. FOREST SERVICE, *et al.*
Defendants.

ORDER

This consolidated matter comes before the Court on the parties' cross-motions for summary judgment and following a bench trial on Plaintiffs' claims brought under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 ("RFRA").[1] The Court now makes its ruling.

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[1] The Complaint for the Navajo Nation and the Sierra Club was initially filed on June 17, 2005. However, on June 23, 2005, before the Complaint was served, the Navajo Nation and Sierra Club filed a First Amended Complaint that added as Plaintiffs the White Mountain Apache Tribe, the Yavapai-Apache Tribe, the Center for Biological Diversity and the Flagstaff Activist Network. These parties will be referred to as the Navajo Plaintiffs throughout this opinion. Shortly after the Navajo Plaintiffs amended their Complaint, three separate Complaints were filed by: (1) Hualapai Tribe, Norris Nez, and Bill Bucky Preston ("Hualapai Plaintiffs"); (2) Rex Tilousi, Dianna Uqualla,

I. FACTUAL BACKGROUND

This case involves a challenge to the Forest Service's decision to authorize upgrades to facilities at the Arizona Snowbowl ("Snowbowl"), an existing ski area in the Coconino

National Forest ("CNF").[2] The Plaintiffs in this consolidated case include the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the Yavapai Apache Nation, the White Mountain Apache Nation, Bill Bucky Preston (a member of the Hopi Tribe), Norris Nez (a member of the Navajo Nation), Rex Tilousi (a member of the Havasupai Tribe), Dianna Uqualla (a member of the Havasupai Tribe), the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network. The Defendants are the United States Forest Service ("Forest Service"), Nora Rasure, the Forest Superisor, and Harv Forsgren, who was the appeal deciding officer and Regional Forester. Both Ms. Rasure and Mr. Forsgren were named as Defendants in their individual capacity. In addition, the Arizona Snowbowl Resort Limited Partnership ("ASR"), the current owner and operator of the facilities located at the Snowbowl ski area, moved to intervene in these proceedings on June 27, 2005. After receiving briefing

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and the Havasupai Tribe ("Havasupai Plaintiffs"); and (3) the Hopi Tribe. On unopposed motion, these matters were transferred and consolidated with the instant action on July 13, 2005.

[2] The current proposal does not seek to expand the existing Snowbowl Special Use Permit ("SUP") of 777-acres, but instead, seeks to upgrade the Snowbowl's existing facilities and infrastructure. Many of the activities approved by the current Snowbowl decision were previously authorized by the 1979 Environmental Impact Statement ("EIS"), and all of the approved activities are within the preexisting permit boundary.

on ASR's motion and hearing oral argument, the Court granted ASR's Motion to Intervene (Doc. 45) on July 18, 2005.

The Snowbowl lies on the western flank of the San Francisco Peaks ("Peaks"), and is operated under a 777-acre Forest Service-issued SUP, which is renewable on a 40-year basis. The CNF Land and Resource Management Plan ("Forest Service Plan"), which was subject to its own process under the National Environmental Policy Act ("NEPA") and adopted in 1987, designates the entirety of the Snowbowl SUP as a "Developed Recreation Site." Under the Forest Service Plan, the Snowbowl is located within management area ("MA") 15, which has a management emphasis of developed recreation, including the Snowbowl recreation facilities. Furthermore, the Snowbowl is surrounded on three sides by the 18,963-acre Kachina Peaks Wilderness, which is designated as MA 1 and managed for wilderness values.

The Snowbowl has been used as a ski area since 1938. In 1979, the Forest Service conducted an extensive process pursuant to NEPA to evaluate proposed upgrades to the Snowbowl, which included the installation of new lifts, trails and facilities. Specifically, the 1979 Snowbowl decision approved 206 acres of skiable terrain and facilities to support a comfortable carrying capacity ("CCC") – the number of guests that the Snowbowl facilities could comfortably carry at one time – of 2,825 skiers. The Forest Service's decision to approve the proposed action was challenged in court by several Indian tribes. The tribes asserted that development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes.

Wilson v. Block, 708 F.2d 735, 738 (D.C. Cir. 1983), *cert. denied*, 464 U. S. 956 (1983). In addition, the tribes argued that development would seriously impair their ability to pray and conduct ceremonies upon the Peaks. *Id.* However, the District of Columbia Court of Appeals eventually upheld the Forest Service's decision to move forward with the upgrades. *Id.* at 760.

Since 1979, the Snowbowl has operated under the direction of the EIS upheld in *Wilson*. Many of the improvements authorized by the Forest Service in 1979, and later upheld by the *Wilson* decision, have been implemented over the years. However, in September of 2002, ASR sought to implement the remaining previously authorized upgrades (including cutting certain ski runs), and submitted a formal proposal to implement snowmaking at the facility using A+ reclaimed water. After an extensive environmental review under NEPA that spanned several years of public participation, tribal consultation and input, and analysis, the Forest Service ultimately approved ASR's proposal. Specifically, in February of 2005, Forest Supervisor Nora Rasure issued a Final Environmental Impact Statement ("FEIS") and a Record of Decision ("ROD"). The Forest Service's ROD approved,in part: (a) approximately 205 acres of snowmaking coverage throughout the area, utilizing reclaimed water; (b) a 10 million-gallon reclaimed water reservoir near the top terminal of the existing chairlift and catchments pond below Hart Prairie Lodge; (c) construction of a reclaimed water pipeline between Flagstaff and the Snowbowl with booster stations and pump houses; (d) construction of a 3,000 to 4,000 square foot snowmaking control building; (e) construction of a new 10,000 square foot guest services facility; (f) an increase in skiable acreage

from 139 to 205 acres – an approximate 47% increase;[3] and (g) approximately 47 acres of thinning and 87 acres of grading/stumping and smoothing. The Plaintiffs appealed the Forest Supervisor's decision, and the Forest Service's Southwestern Regional Office arranged a technical review team to evaluate the administrative appeals. On June 8, 2005, the Forest Service issued its final administrative decision and affirmed the Forest Supervisor's original conlusions. This litigation followed.[4]

On August 12, 2005, the parties filed cross-motions for summary judgment on, in part, claims brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). The APA claims are based on the Forest Service's alleged failure to comply with requirements of NEPA, 42 U.S.C. §§ 4321-4307d ("NEPA"), the National Historic Preservation Act, 16

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[3] It is important to note that although only 139 acres of skiable terrain currently exist at the Snowbowl, the *Wilson* decision specifically approved 206 acres of skiable terrain. Accordingly, the current proposal, to the extent it seeks to increase skiable acreage, is fully consistent with the D.C. Circuit's previous ruling in 1983 upholding the Forest Service's 1979 decision.

[4] Shortly after filing their complaints, the Plaintiffs filed a Motion for Temporary Restraining Order Or, In the Alternative, Preliminary Injunction (Doc. 5). A few days later, the Plaintiffs filed a Stipulated Motion to Withdraw Plaintiffs' Motion for Temporary Restraining Order (Doc. 12), and requested that the Court set a briefing schedule for Plaintiffs' preliminary injunction motion. The stipulated motion was granted by the Court. On July 13, 2005, the Court heard oral argument on the Plaintiffs' Motion for Preliminary Injunction. However, the request for relief was denied as moot after the parties agreed that ASR would not move forward with the project until after the Court ruled on the anticipated summary judgment motions and, if necessary, held a bench trial on the RFRA claims.

U.S.C. §§ 470 *et seq.* ("NHPA"), RFRA, 42 U.S.C. §§ 2000bb-2000bb-4 ("RFRA"), the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"), the Grand Canyon National Park Enlargement Act, 16 U.S.C. § 228i ("GCEA"), and the National Forest Management Act, 16 U.S.C. §§ 1600-1687 ("NFMA"). In addition, an alleged failure of the Forest Service to comply with its trust responsibility to the tribes was included in these motions.

II. Legal Standard and Analysis

In reviewing administrative agency decisions, the function of the district court is to determine, as a matter of law, whether evidence in the administrative record permitted the agency to render the decision it did. Accordingly, summary judgment is an appropriate mechanism for deciding the legal question of whether an agency could reasonably have found the facts as it did.

A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by an agency action within the meaning of the relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702. Agency action made reviewable by statute, and final agency action for which there is no other adequate remedy in a court, are subject to judicial review. 5 U.S.C. § 704. Under the APA, a reviewing court may "hold unlawful and set aside agency action, findings and conclusions" that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706; *Center for Biological Diversity v. United States Forest Service*, 349 F.3d 1157, 1165 (9th Cir. 2003). To determine whether agency action was arbitrary or capricious, a court must consider "whether the decision was based upon a consideration of the

relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 368 (1989).

A. National Environmental Policy Act

The purpose of NEPA, 42 U.S.C. §§ 4321 *et seq.*, is to focus the attention of federal agencies and the public on a proposed action so that the environmental impacts of the action can be studied before a decision is made. By focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, (1989). Accordingly, NEPA requires federal agencies to prepare an EIS for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2). However, NEPA does not mandate certain substantive results, but instead prescribes the necessary process an agency must undergo to evaluate a proposed action's potential environmental impact. *Methow Valley*, 490 U.S. at 350.

In reviewing the required EIS, the court must determine whether the document contained a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). Within the Ninth Circuit Court of Appeals, courts are directed to employ a "rule of reason" standard to make this finding. *Center for Biological Diversity*, 349 F.3d at 1166. Under the rule of reason standard, which is essentially applied in the same manner as the arbitrary and capricious standard, review consists only of ensuring that the

agency has taken a hard look at the environmental effects of the proposed action.[5] *Id.* Once the court is satisfied that a proposing agency has taken the requisite hard look at a decision's environmental consequences, the review is at an end. *Friends of the Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998).

It is the Plaintiffs' position that the Forest Service failed to take the required hard look at the environmental consequences of its actions, and that as a result, the Forest Service's actions were arbitrary, capricious and not otherwise in accordance with law. However, the Defendants and Intervenor respond that the Forest Service fully discharged its NEPA responsibilities by preparing an EIS with public involvement. Each NEPA violation alleged by the Plaintiffs is discussed individually below.

1. Statement of Purpose and Need

The Plaintiffs in this case allege that the stated purpose and need for the proposed action is impermissibly narrow, improperly focused solely on improving the Snowbowl's financial viability, and based on faulty data. The Defendants and Intervenor assert that the stated purpose and need is reasonable and provided the basis for the Forest Service's consideration of a reasonable range of alternatives. The Forest Service identified the overall purpose and need for the project as follows: (1) to ensure a consistent and

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[5] The Court notes that the adjective "hard," and the phrase "hard look," are subject to at least twenty-five different definitions or meanings. Nevertheless, the parties have used the phrase "hard look" to define the nature of the inquiry required of the Forest Service; therefore, it is reluctantly adopted by the Court.

reliable operating season, thereby maintaining the economic viability of the Snowbowl and stabilizing employment levels and winter tourism within the local community; and (2) to improve safety, skiing conditions, and recreational opportunities, bringing terrain and infrastructure into balance with current use levels.

The regulations implementing NEPA explain that an EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Furthermore, the Ninth Circuit has determined that agencies should be afforded considerable discretion in defining the purpose and need of a project. *Morrison*, 153 F.3d at 1066. However, this discretion is not without limitations. *Id.* For example, "an agency cannot define its objectives in unreasonably narrow terms." *City of Carmel by the Sea v. United States Dep't. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *see also City of New York v. United States Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983) ("[A]n agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered.").

The Court concludes that the Forest Service's statement of purpose and need for the proposed project is not unreasonable. *See City of Carmel by the Sea*, 123 F.3d at 1155 (Forest Service's statement of purposes is to be evaluated under a reasonableness standard). The Forest Service Plan, which the Forest Service points out was subject to its own NEPA process, designates the entirety of the Snowbowl SUP as a "Developed Recreation Site." Under the Forest Service Plan, the Snowbowl is located within MA 15,

which has a management emphasis of developed recreation, including the Snowbowl recreation facilities. Furthermore, the Final EIS explains that the proposed action "responds to the goals and objectives outlined in the Forest Service Plan, and helps move the project area towards desired conditions described in it." For example, the FEIS states that one purpose of the proposed action is to "ensure a consistent and reliable operating season" at the Snowbowl. According to the Forest Service, because skier visits at the Snowbowl are directly correlated to the amount of snow on the ground, the significant variability in snowfall has resulted in an inconsistent operating season. In addition, the goal of providing a reliable ski season is consistent with the Forest Service's multiple-use mandate and direction to provide recreational opportunities for the public.

The Court notes that the FEIS also identifies the need "to improve safety, skiing conditions, and recreational opportunities by bringing existing terrain and infrastructure into balance with existing demand." For example, the Forest Service identified a need to "[i]mprove the quantity and distribution of beginner and intermediate (including low intermediate and advanced intermediate) terrain and skier safety by developing additional terrain within the existing SUP area." The FEIS adequately documents that the Snowbowl has a deficit of intermediate and beginner terrain when compared to ski industry norms. In sum, the Court concludes that the Forest Service developed a reasonable statement of purposes and needs under the standard developed by the Ninth Circuit.

2. Reasonable Range of Alternatives

Next, the Plaintiffs contend that the Forest Service violated NEPA by failing to consider a reasonable range of alternatives. For example, the Navajo Plaintiffs contend that the Forest Service should have considered a proposal to close the ski area, a buy-out by the tribes, or an alternative with reduced snowmaking coverage. In addition, the Havasupai Plaintiffs maintain that the Forest Service should have considered water trading. In response, the Forest Service states that it did, in fact, consider many of the alternatives raised by the Plaintiffs, but reasonably eliminated them from more detailed evaluation because they did not meet the purposes and needs for the proposed action. Moreover, the agency points out that many of the alternatives proposed by the Plaintiffs do not represent feasible propositions.

The Code of Federal Regulations requires that only reasonable alternatives be considered. 40 C.F.R. § 1502.14.

> In this section agencies shall:
>
> (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. (c) Include reasonable alternatives not within the jurisdiction of the lead agency. (d) Include the alternative of no action. (e) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.14.

"An agency's discussion of alternatives must be bound by some notion of feasibility." *Muckleshoot v. United States Forest Service*, 177 F.3d 800, 814 (9th Cir. 1999). In addition, an agency need not consider every available alternative. *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1180 (9th Cir. 1994). The range of alternatives is reviewed under a rule of reason that requires an agency to set forth only those alternatives necessary to permit a reasoned choice. *Id.* NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences. *Id.* at 1181. However, NEPA does require federal agencies to rigorously explore and objectively evaluate all reasonable alternatives. With respect to alternatives that were eliminated from detailed study, NEPA simply requires a brief discussion of the reasons for their elimination. 40 C.F.R. § 1502.14(a). As the parties correctly identify, "[t]he existence of reasonable but unexamined alternatives renders an EIS inadequate." *Morrison*, 153 F.3d at 1065; *see also Muckleshoot*, 177 F.3d at 814.

A review of the EIS shows that the Forest Service gave detailed consideration to three alternatives: (1) the no action alternative; (2) the proposed action; and (3) the no snowmaking or snowplay alternative, which responds to public concerns over the use of reclaimed water on the Peaks. Furthermore, the Forest Service also gave consideration to an alternative to remove the ski area; several alternatives that would have included night lighting; an alternative with a lower amount of new skiable terrain; an alternative with reduced snowmaking coverage; alternatives that would have included summer recreational activities such as mountain biking; alterna-

tives that would have used on-site or nearby water sources instead of reclaimed water; and an alternative that would have used other pipeline alignments. In addition, the Court concludes that the Forest Service properly eliminated closure of the Snowbowl from detailed analysis because it did not meet the stated purposes and needs for the proposed action. Since the Coconino Forest Service Plan instructs that the 777 acres of the Snowbowl be managed to emphasize developed recreations, an alternative that would dismantle the ski area was certainly outside the scope of the proposed action and need not have been considered in detail. As the Ninth Circuit has previously stated, "[w]hen the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved." *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986).

The statement of purposes and needs for the Snowbowl proposal permitted the Forest Service to evaluate a reasonable range of alternatives. The Plaintiffs bear the burden of demonstrating to the Court that they brought a reasonable alternative to the Forest Service's attention during the public NEPA process, and that such an alternative was not adequately considered. *City of Angoon*, 803 F.2d at 1021-22. The Plaintiffs have failed to meet this burden.[6] Accordingly, the Court concludes that the

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[6] Many of the reasonable alternatives Plaintiffs now advance in their respective motions for summary judgment were never raised in the NEPA comment process or in the administrative appeals. Accordingly, this failure now bars them from judicial review due to the requirement of exhaustion. For example, although they now claim otherwise, not one tribal plaintiff comment letter or appeal letter mentions the buy-out alternative now advanced by the Navajo Plaintiffs. However, the Court

Forest Service did not act unreasonably in rejecting the various alternatives raised by the Plaintiffs during the project's public scoping process.

3. Cumulative and Indirect Impacts

a. Impacts of Diverting 1.5 Million Gallons of Reclaimed Water a Day

The Plaintiffs contend that the Forest Service failed to take the requisite hard look at the environmental impacts of the Snowbowl expansion project by neglecting to consider the cumulative impacts and/or indirect effects of diverting 1.5 million gallons of reclaimed water a day from Flagstaff' s aquifer to the Snowbowl for snowmaking.[7] The Plaintiffs assert that "the proposed snowmaking will result in a decrease to the aquifer" and point to a technical report prepared

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notes that even if the alternative was properly raised before the Forest Service, it is not significantly distinguishable from an alternative to close the ski area, which was considered. *See Headwaters*, 914 F.2d at 1180-81.

[7] The Plaintiffs also maintain that the Forest Service failed to address the cumulative and indirect impacts on noise, on aesthetics, on traffic and ski area access, and on wildlife and habitat. However, a review of the FEIS reveals that the Forest Service specifically evaluated and disclosed the anticipated effects of each of these categories. For example, regarding noise impacts, the Forest Service determined that from a distance of 1.5 miles and closer, the snowmaking system would be audible and above ambient noise levels. With respect to impacts on aesthetics, the Forest Service used the Visual Management System – a landscape management tool – to evaluate the proposed action's impacts to certain visual quality objectives and disclosed the cumulative visual effects in the FEIS. In addition, the FEIS documents careful consideration of impacts to traffic and ski area access in Section 3C. Lastly, Section 3K of the FEIS contains a detailed analysis of the Snowbowl proposal's potential impacts on wildlife.

by Peter Schwartzman and Abe Springer, along with other public comments as the basis for their argument. However, the Court concludes that the Forest Service did not refuse or fail to consider this impact.

A review of the FEIS reveals that the Forest Service identified the proposed action's potential impacts on aquifer recharge as an area requiring additional analysis and disclosure. The Snowbowl FEIS Section on Watershed Resources–Chapter 3H–specifically analyzed the potential long-term effects on the regional aquifer from diversions of reclaimed water for snowmaking. For example, the agency contracted hydrologists to study "precipitation; water loss to evaporation, transpiration, and sublimation; and the resulting water available for groundwater recharge or surface water run off." This data was then used to analyze how much water would be available for recharge to the regional aquifer. The Forest Service found that the proposed snowmaking would result in a reduction in groundwater recharge to the regional aquifer of slightly less than two percent of the City of Flagstaff s total annual water production. The cumulative watershed impact as a result of the diversion was determined to be negligible to moderate.[8] The Court also notes that in reaching this estimate, the Forest Service considered, among other sources, the Schwartzmann and Springer report raised by the Plaintiffs. In sum, the record demonstrates and the Court is satisfied that the Forest Service responded to concerns about the

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[8] Even with the amount of reclaimed water diverted to the Snowbowl, the Rio de Flag Water Reclamation Facility ("WRF") would still have over 500,000 gallons per day available for release to the Rio de Flag.

impacts to recharge of the aquifer by conducting reasonable analysis.

b. Impacts of Snowmaking Using Reclaimed Water

Next, the Plaintiffs contend that the Forest Service failed to conduct a reasonable scientific analysis of the environmental impacts of the proposed snowmaking. However, the Defendants and Intervenor maintain that the Forest Service took a hard look at the impacts of snowmaking using reclaimed water. The Court concludes that the record shows that the Forest Service conducted a reasonable scientific analysis of the environmental impacts of the proposed snowmaking based on the best available scientific evidence.

First and foremost, it is important for the Court to note that the Arizona Department of Environmental Quality ("ADEQ") has adopted water quality standards for the direct reuse of reclaimed water aimed at protecting health and the environment. Furthermore, the ADEQ specifically allows Class A+ reclaimed water – the class of water to be used at the Snowbowl – for direct reuse in snowmaking. As such, the Forest Service properly relied, in part, upon the ADEQ's determination that snowmaking is an acceptable and safe use of reclaimed water. In addition, the Forest Service evaluated extensive data monitoring Class A+ reclaimed water from the Rio de Flag WRF for wastewater constituent, as well as monitoring for metals, organic chemicals, and other parameters. Furthermore, the Forest Service also retained experts in hydrogeology to evaluate the effects of reclaimed water use on the quantity and quality of groundwater. In sum, the Court determines that the agency took a hard look at the effects of using Class

A+ reclaimed water to make artificial snow at the Snowbowl.

4. Opposing Scientific Viewpoints

The Plaintiffs claim that the Forest Service failed to consider certain scientific evidence about the use of reclaimed water. Specifically, the Plaintiffs contend that the Forest Service failed to adequately discuss and disclose the results of the studies conducted by the United States Geological Survey ("U.S.G.S.") and Dr. Catherine Propper and the report submitted by Dr. Paul Torrence.[9] The Defendants and Intervenor maintain that the Forest Service adequately evaluated and responded to all reasonable opposing scientific viewpoints submitted during the NEPA process.

The Council on Environmental Quality's ("CEQ") regulations delineate the analysis that environmental impact statements must contain. Specifically, the agency "shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." 40 C.F.R. § 1502.9(b); *Center for Biological Diversity*, 349 F.3d at 1167. This disclosure requirement obligates the agency to make available to the public high quality information, including accurate scientific analysis and expert agency comments,

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[9] Dr. Catherine Propper, Ph.D., is an Associate Professor in the Department of Biological Sciences at Northern Arizona University ("NAU"). Dr. Paul Torrence holds a Ph.D. in organic chemistry and is a Professor of Chemistry and Biochemistry at NAU. He is also a Full Investigator at the Arizona Cancer Center in Tucson. Both individuals submitted comments during the public scoping process concerning the potential health and environmental impacts of using reclaimed wastewater for snowmaking.

before decisions are made and actions are taken. 40 C.F.R. § 1500.1(b). Furthermore, "an agency is entitled to wide discretion in assessing the scientific evidence, so long as it takes a hard look at the issues and responds to reasonable opposing viewpoints." *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1301 (9th Cir. 2003). "Because analysis of scientific data requires a high level of technical expertise, courts must defer to the informed discretion of the responsible federal agencies." *Id.* "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts, even if a court may find contrary views more persuasive." *Marsh*, 490 U.S. at 377.

In this case, the record demonstrates that the agency evaluated and disclosed the research by Dr. Propper. For example, the FEIS explains that Dr. Propper "conducted in vitro (test tube) and in vivo (whole body) tests of Flagstaff wastewater effluent to evaluate vertebrate behavior and physiological effects on the endocrine system." In addition, her project proposal and the results of her research are included in the Administrative Record The Forest Service included within the FEIS the conclusion that the "proposed use of reclaimed water for snowmaking at the Arizona Snowbowl will not result in comparable environmental exposure as investigated by Dr. Propper." Based on the Forest Service's analysis and disclosure of Dr. Propper's research, the Court cannot conclude that the agency violated NEPA.

In addition, the Forest Service also responded to the concerns voiced by Dr. Torrence within the FEIS. Dr. Torrence's comments made in response to the DEIS all focus on variations of the same allegation: that the agency failed to fully consider the range of

implications of endocrine disruptors that may be present in reclaimed water. However,a review of the FEIS reveals that the Forest Service considered the presence of synthetic organic chemicals from pharmaceutical and personal care products in water and the potential that some of the compounds will impact the endocrine system in wildlife and humans. The Forest Service explained that "[r]ecent research indicates that endocrine disruptors have aquatic habitat impacts, but no health impacts, at concentrations found in receiving waters."

The FEIS explains that the agency's analysis of this issue was based on its review of recent studies, as well as the Global Assessment on the State-of-the Science of Endocrine Disruptors, a report prepared by an expert panel on behalf of the World Health Organization.

The Court is satisfied that the Forest Service properly evaluated and disclosed all comments and reasonable opposing scientific viewpoints that were available during the NEPA process. Even if the Court were to find the viewpoints of Dr. Propper and Dr. Torrence more persuasive than the Forest Service's interpretation of the overall scientific evidence, that would not be enough to declare the agency's decision arbitrary and capricious. As indicated above, the Court is obligated to defer to the responsible federal agency's informed assessment of the scientific evidence.

5. Failure to Make Decisional Materials Available

The Plaintiffs also argue that the Forest Service violated NEPA by failing to make decisional materials publicly available before its final decision was

rendered. It is undisputed that the Forest Service was required to supplement the Snowbowl Project Record with certain documents that were part of the decision-making process. These documents – which included the Forest Service Plan and various letters sent to the tribes about the National Register nomination of the Peaks – were all referenced in record documents, even though they were not initially designated as part of the project record. Accordingly, any person seeking the information referenced or described in the project record would be aware of their existence. Under NEPA, an agency is required to "[m]ake environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act ["FOIA"]." 40 C.F.R. § 1506.6(f). The Court concludes that the Forest Service complied with this provision. As the Forest Service points out, all of the documents that were subject to release under FOIA were available upon request at any time during the NEPA process, and the Plaintiffs have offered no evidence to the contrary.

B. National Historic Preservation Act

The Plaintiffs argue that the Forest Service did not comply with its obligations under the NHPA. For example, the Plaintiffs contend that the tribes did not have a reasonable opportunity to participate in the resolution of the adverse effects of the proposed action. In addition, the Plaintiffs assert that the timing of the completion of the Memorandum of Agreement ("MOA"), before the end of the NEPA process, suggests that a NEPA decision had already been reached rendering the NHPA consultation inadequate.

The NHPA directs federal agencies to consider the effects of their undertakings on historic properties included in or eligible for inclusion in the National Register of Historic Places and to consult with certain parties before moving forward with an agency action. 16 U.S.C. § 407f; *see* 36 C.F.R. § 800.1. Regulations implementing the NHPA have been adopted by the Advisory Council on Historic Preservation ("ACHP"). The general procedure set forth in the applicable regulations requires an agency as early as possible, and in any event before taking any action that would foreclose the ACHP's ability to comment, to identify any National Register or eligible property located within the area of the undertaking's potential environmental impact which may be affected by the undertaking. 36 C.F.R. § 800.4. The agency must then determine the effect of a proposed undertaking on any National Register or eligible property.

An effect occurs (1) "whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological or cultural characteristics that qualify the property for the National Register," or (2) when an undertaking "changes the integrity of location, design, setting, materials, workmanship, feeling, or association of the property" that contributes to its historic significance. 36 C.F.R. § 800.3(a) and (b); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1435 (D. Cal. 1985).

When an effect is identified, the agency, in consultation with the State Historic Preservation Office ("SHPO"), must determine whether the effect would be adverse. This process includes applying the criteria of adverse effect, which includes: (1) destruction or alteration of all or part of a property; (2) isolation

from or alteration of a property's surrounding environment; (3) introduction of visual, audible, atmospheric elements that are out of character with the property or alter its setting . . . . 36 C.F.R. § 800.3(b); *Colorado River Indian Tribes*, 605 F. Supp at 1435.

If the agency finds an adverse effect, then it must (1) prepare a Preliminary Case Report requesting the comments of the ACHP, (2) notify the SHPO of this request, and (3) undertake the consultation process set forth in § 800.6. *Colorado River Indian Tribes*, 605 F. Supp. at 1435. Under the consultation process set forth in § 800.6, the agency, the SHPO, and the Executive Director of the ACHP are the consulting parties who must "consider feasible and prudent alternatives to the undertaking that could avoid, mitigate, or minimize adverse effects on a National Register or eligible property. 36 C.F.R. § 800.4(d). The consulting parties must then execute a MOA either specifying how the adverse effects will be avoided or mitigated, or acknowledging that they cannot be avoided or mitigated and specifying any recording, salvage, or other measure to minimize the adverse effects that shall be taken before the undertaking proceeds. *Id.* Although other parties may be invited to sign the MOA as well, their participatory signature is not required under the applicable regulations. *Id.* at 800.6(c)(2). Once the MOA is "executed and implemented pursuant to [the ACHP regulations]" it evidences the agency official's compliance with § 106 of the NHPA. *Colorado River Indian Tribes*, 605 F. Supp. at 1436.

For the Snowbowl project, the agency ultimately made a "Finding of Adverse Effect." Accordingly, the record demonstrates that the agency then sought

ways to avoid, minimize or otherwise mitigate the adverse effects that were associated with each of the three alternatives under consideration.[10] Furthermore, the record is replete with agency efforts to involve the tribes in the resolution of those identified adverse effects.[11] For example, three separate letters were sent out and three sets of phone calls were made specifically requesting tribal input on the resolution of the adverse effects. These communications also included invitations for the tribes to meet and discuss the MOA. The record also reveals that the Forest Service sent each tribe a draft MOA along with an invitation to participate as a consulting party in further developing the agreement.

Ultimately, the Forest Service's consultation efforts resulted in the execution of a MOA among the required parties. Four Indian tribes, including two named Plaintiffs in this case, the Hualapai and the Yavapai-Apache Nation, also signed the MOA. The MOA adequately describes the steps to mitigate the potential adverse effects of the proposed projects; therefore, it fully satisfied the Forest Service's

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[10] For example, the agency has guaranteed traditional cultural practitioners access within and outside the SUP as well as free use of the ski lifts in the summer. The agency has also committed to working to protect any plants of traditional importance that may be subsequently identified in the project area. Also, to the extent practicable, the Forest Service, has indicated that the final location of new ski trails will use previously disturbed areas.

[11] Throughout the tribal consultation process, the Forest Service made over 200 phone calls, held 41 meetings, and exchanged 245 letters with tribal representatives. Although the consultation process did not end with a decision the tribal leaders supported, this does not mean that the Forest Service's consultation process was substantively and procedurally inadequate.

obligations under the NHPA.[12] The MOA includes steps that the Forest Service and ASR must take regardless of which alternative was ultimately chosen, including the obligation to continue to consult tribes to mitigate any adverse effects and to continue to guarantee access to the Peaks for traditional cultural activities. Among other things, the MOA requires: (1) access before, during and after construction; (2) protection and regeneration of plants of traditional importance; (3) that the Forest Service must work to ensure that current ceremonial activities continue uninterrupted; (4) that the Forest Service must protect shrines; (5) that tribes must be provided water-quality information; and (6) where practicable, projects must take advantage of previously-disturbed areas. Furthermore, the MOA also permits periodic inspections by tribal representatives, including prior to construction in order to minimize the impact of the pipeline route.

With respect to the Plaintiffs' argument regarding the timing of the completion of the MOA, the Court finds it unpersuasive. As the Defendants point out, NHPA encourages agencies to combine the consultation efforts with the NEPA process. 36 C.F.R. § 800.8. Nomination of a specific historic property to the National Register is a separate process that need not

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[12] The consultation process with the tribes did result in changes to the proposed action. For example, the Snowbowl's request to have night lighting at the facility was not approved by the Forest Service, in part, due to Tribal comments and religious concerns that authorizing night lighting would not permit the Peaks to rest at night. However, as the Plaintiffs point out, the removal of night lighting from the project proposal also addressed the fact that Flagstaff is a dark sky city. Furthermore, the Forest Service found that night lighting did not meet the purposes and needs for the project.

be complete in order for the agency to meet its consultation obligations under the NHPA.

The Court finds it important to note that consultation on the proposed Snowbowl improvements formally began in 2002 and spanned a two year period; however, the Forest Service has been consulting with approximately 13 tribes or chapters about the religious and cultural significance of the Peaks since at least 1970. The record indeed demonstrates that the Forest Service made extensive, good faith efforts to seek tribal input on the religious and cultural significance of the Peaks, and provided a reasonable opportunity for the tribes to participate in the resolution of the proposal's potential adverse effects.

C. National Forest Management Act

The Plaintiffs claim that the Forest Service failed to ensure the viability of native species in the project area in violation of the National Forest Management Act, 16 U.S.C. §§ 1600-1687. Specifically, the Plaintiffs contend that the agency failed to adequately address potential impacts on certain management indicator species ("MIS"). For example, the Plaintiffs maintain that the Forest Service was required to collect population data from the project area for three MIS (Abert and red squirrels and the pygmy nuthatch). However, the Forest Service responds that the agency was not required to collect population data on these MIS in the Snowbowl area at all and satisfied NFMA by using the most up-to-date data available to assess the potential impacts on forest-wide habitat and trends for the MIS. The Forest Service contends that it carefully evaluated the potential effects of the proposed activities and determined that the project would not harm MIS or other wildlife.

The Court concludes that the Defendants satisfied NFMA's requirements by complying with the Coconino Forest Service Plan direction related to MIS. The currently applicable Forest Service regulations specify that pending revision of Forest Plans, National Forests have the option to utilize habitat data as to any obligation regarding MIS. 36 C.F.R § 219.14(f). Furthermore, population monitoring is required only when the Forest Service Plan so provides. Id. Accordingly, a review of the FEIS shows that the Forest Service analyzed the effects of the Snowbowl alternatives on forest-wide habitat and trends for the MIS. The Forest Service concluded that, under the selected alternative, habitat modifying activities within the SUP area "would not alter habitat for MIS outside the SUP area." As pointed out by the Forest Service, the Forest Service Plan does not require the Forest Service to evaluate the impacts of the proposal on MIS because there are no MIS assigned to the management area where the Snowbowl is located. However, the Court finds that the Forest Service did conduct a thorough assessment of the effects of the proposed reclaimed water pipeline on MIS in MAs 3, 4, 5 and 9 as the pipeline will cross those management areas.

E. Grand Canyon Enlargement Act

In their ninth claim for relief, the Havasupai Plaintiffs allege that the Forest Service violated the GCEA "by permitting an activity that will detract from the existing scenic and natural values of . . . lands [transferred to the Havasupai Tribe pursuant to the GCEA], [and] failing to keep them 'forever wild.'" Specifically, the Plaintiffs assert that the lands transferred to the Havasupai Tribe will be "directly impacted by the spring melt from the

Snowbowl's snow made from reclaimed water." However, because the Plaintiffs misconstrue the GCEA, summary judgment on this claim is granted in favor of the Defendants.

As part of the GCEA, "Congress declared that an additional 185,000 acres were to be held in trust enlarging the reservation of the Havasupai Tribe." Havasupai Tribe v. United States, 752 F. Supp. 1471, 1483 (D. Ariz. 1990) (citing 16 U.S.C. § 228i(a)). However, the plain language of the GCEA and the legislative history described in the *Havasupai Tribe* opinion demonstrate that the GCEA does not impose any limitations on the government's uses of other lands and cannot be read to restrict activities on lands outside the Havasupai reservation. 752 F. Supp. at 1471. As such, the Defendants are entitled to summary judgment on the Plaintiffs' GCEA claim.

F. Endangered Species Act

In its tenth claim for relief, the Hopi Plaintiffs allege that the Forest Service violated the ESA in its approval of the proposed project. However, prior to asserting such a claim in the district court the Plaintiffs were required to have first provided written notice of the alleged violation to the Secretary of the Interior sixty days in advance of filing suit. 16 U.S.C. § 1540(g)(2)(A)(i). Since the Hopi Plaintiffs did not provide such notice, this Court is without the jurisdiction to consider the claim. *See Southwest Center for Biological Diversity v. Bureau of Reclamation*, 143 F.3d 515, 520-22 (9th Cir. 1998); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988) (holding that 60-day notice requirement was not met and the ESA claim must be dismissed for lack of jurisdiction). Accordingly, the Court grants summary

judgment in the Defendants' favor on this particular claim.

G. Breach of Trust Claim

The Plaintiffs allege that the issuance of the Snowbowl SUP constitutes a violation of the government's trust responsibility to the tribes. Although it is undisputed that the United States is indeed a trustee for the tribes, at issue in this case is whether that trust imposes any additional enforceable fiduciary duties upon Defendants with regard to the issuance of the SUP beyond compliance with generally applicable regulations and statutes. Based on the governing law, the Court concludes that no such additional trust duties exist. Although there may be a general fiduciary duty of the federal government owed to the tribes, "unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indians." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). Because this case does not involve tribal property, the Forest Service's duty to the tribes is to follow all applicable statutes.[13] *Id.* Since the Court has found that the agencies did not violate any statutes during the approval for the

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[13] The Havasupai Plaintiffs specifically argue that the Defendants breached their trust obligations by allegedly compromising the quality of the tribe's water, in violation of the GCEA. However, the Court previously concluded that the Plaintiffs have failed to state a violation of the GCEA and thus cannot use this statute to support its trust claim

Snowbowl project, the agency satisfied its fiduciary duty to the local tribes.[14]

D. Religious Freedom Restoration Act

Pursuant to RFRA, the Plaintiffs seek declaratory and injunctive relief that would: (1) declare that the selected alternative, as approved, violated RFRA; and (2) stop the Forest Service and ASR from taking steps in furtherance of the selected alternative. According to the Plaintiffs, the proposed upgrades to the Snowbowl, particularly the use of reclaimed water to make snow, will have negative, irreversible, and devastating effects to their religious, traditional and cultural practices. However, the Defendants and ASR assert that since there is no evidence that the decision will exclude tribal practitioners from the Peaks, no evidence of any diminution of access, no inability to collect medicinal or ceremonial plants and other materials, and no prohibition on holding religious ceremonies anywhere on the Peaks, there is, consequently, no substantial burden on the exercise of the Plaintiffs' religion.

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[14] The Navajo and Hualapai Plaintiffs both assert that the Forest Service has violated its trust responsibilities by failing to comply with certain Executive Orders; however, since these Executive Orders are not independently enforceable, such claims have no merit. The Executive Orders cited by the Plaintiffs expressly state that they "are intended only to improve the internal management of the executive branch" and do not create any trust responsibility or right to judicial review. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7632-33 (Feb. 11, 1994) (provision 6-609; Exec. Order No. 13,007, 61 Fed. Reg. 26771, 26772 (May 24, 1996 (Sec. 4); Exec. Order No. 13,175, 65 Fed. Reg. 67429, 67252 (Nov. 6, 2000) (Sec. 10). Furthermore, the FEIS documents that the Forest Service considered these Executive Orders.

Although the parties all moved for summary judgment on their RFRA claims, the Court concluded that the claims were not suitable for disposition on summary judgment. Due to the necessity for the Court to make various factual findings, a bench trial was held to determine whether the proposed action placed a substantial burden on the Plaintiffs' exercise of their religion. Having reviewed the Administrative Record filed in this matter, the pleadings, annexed declarations and exhibits on the cross-motions for summary judgment, and having heard argument of counsel and testimony during an eleven-day bench trial, the Court makes the following findings of fact and conclusions of law.[15]

1. Findings of Fact

a. The Arizona Snowbowl and the San Francisco Peaks

1. The San Francisco Volcanic field covers approximately 1,800 square miles of northern Arizona. The field lies along the southern perimeter of the Colorado Plateau, defined by the Mogollon Rim to the south of Flagstaff. The most prominent peak within the field is Humphrey's Peak. At 12,633 feet, Humphrey's Peak is the highest point in Arizona.

2. Collectively, Humphrey's Peak, Agassiz Peak (12,356 feet), Doyle Peak (11,460 feet), and Fremont Peak (11,696 feet) are identified on the USGS maps as the San Francisco Mountain.

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[15] The Court is aware that many of the findings made in the RFRA section of this opinion were previously mentioned within the Court's analysis regarding the counts subject to summary judgment. However, the Court chose to reiterate findings that were also pertinent to the RFRA claims despite the redundancy.

However, the mountain is more commonly referred to as the San Francisco Peaks and is identified as such herein.

3. The Snowbowl ski area is located in the CNF in Northern Arizona which comprises 1.8 million acres of public land. Specifically, the Snowbowl lies on the western flank of the San Francisco Peaks ("Peaks").

4. The Peaks cover approximately 74,000 acres of public land, and the ski area constitutes about one percent (1%) of the mountain.

5. The Peaks are extensively documented and widely recognized as a place of cultural importance to the Hopi, Navajo, and other tribes that are Plaintiffs in this case. For years, the Forest Service has recognized the cultural and religious significance of the Peaks to the tribes of the southwestern United States.

6. The Forest Service has identified the Peaks as a Traditional Cultural Property ("TCP") as defined in the National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties.[16] The Peaks have also been

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[16] A TCP is a place that is associated with the cultural practices or beliefs of a living community. Those practices or beliefs must be rooted in the history of the community and be important in maintaining the continuing cultural identity of the community. While not all TCPs are eligible for the National Register, a TCP is eligible if the property plays a role in a community's historically rooted beliefs, customs and practices and meets one of four National Register Criteria for significance: (A) is associated with significant events; (B) is associated with a significant person; (C) is an outstanding example of a type; or (D) is associated with information contained in an archaeological site.

determined as eligible for inclusion on the National Register of Historic Places.

7. The Snowbowl SUP area is surrounded on three sides by the Kachina Peaks Wilderness area, designated by Congress in 1984.

8. Arizona Snowbowl Resort Limited Partnership ("ASR"), the Intervenor, is the current owner and operator of the facilities located within the Snowbowl SUP. The Snowbowl is operated under a 777-acre SUP which was issued to ASR by the Forest Service in 1992 pursuant to the National Forest Ski Area Permit Act of 1986, 16 U.S.C. § 497b.

9. The Forest Service has designated the Snowbowl as a public recreation facility under the Coconino Forest Service Plan. In doing so, the Forest Service found that the Snowbowl represented an opportunity for the general public to access and enjoy public lands in a manner that the Forest Service could not otherwise offer in the form of a major facility anywhere in Arizona.

10. The Snowbowl is the only area dedicated as a downhill ski resort within the CNF. Furthermore, the Coconino Forest Service Plan was approved in 1987 after a separate Environmental Impact Statement process that included public involvement and comment.

11. In addition to downhill skiing, numerous activities are conducted on the Peaks, consistent with the Coconino Forest Service Plan and multiple-use requirements, including sheep and cattle grazing, timber harvesting, road building, mining (including cinder pit mining), gas and electric transmission lines, water pipelines, cellular tow-

ers, motorcross, mountain biking, horseback riding, hiking and camping.

12. The Snowbowl serves a growing population in Arizona based primarily in the Phoenix metropolitan and northern Arizona areas. The Snowbowl is an important public recreational resource of the CNF.

13. Skiing has occurred in the Snowbowl area since the 1930s.

14. In 1979, the Forest Service conducted an extensive process pursuant to the EPA to evaluate proposed upgrades to the Snowbowl, which included the installation of new lifts, trails and facilities. The 1979 Forest Service decision approved 206 acres of skiable terrain and facilities to support a comfortable carrying capacity of 2,825 skiers.

15. The Forest Service's 1979 decision to approve the Snowbowl upgrades was challenged in the courts by several Indian tribes.

16. In *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983), the Court upheld the Forest Service's decision and found that the project did not substantially burden the tribes' exercise of religion. In addition, the Court upheld the more general question of whether to permit skiing in the area. Since the *Wilson* decision, the tribes have continued to use the Peaks for religious purposes.

17. Over the last several years, the Snowbowl has experienced highly variable snowfall and associated extreme variability in skier visits, resulting

in financial deficits over many years and daunting operational issues.

18. Due to its age, many of the existing ski runs at the Snowbowl area are old, steep and narrow which raise ample safety concerns. Likewise, other Snowbowl upgrades are needed to increase the amount of intermediate terrain to spread skiers out and eliminate congestion.

b. The Forest Service Decision and the Snowbowl Upgrades

19. In 2002, ASR initiated the process of having the Forest Service approve upgrades to the existing ski area, which included a proposal for snowmaking. Shortly thereafter, in June of 2002, the Forest Service began its screening process to develop a Proposed Action.

20. Prior to notifying the general public about the proposed upgrades at the Snowbowl in September of 2002, the Forest Service sought input from the tribes.

21. After the proposed action was released to the general public, the Forest Service continued to consult with the tribes, in order to determine the potential or perceived impacts of the proposed facilities improvements to the Snowbowl. The Forest Service made more than 500 contacts with tribal members as part of the Snowbowl consultation process, including between 40 and 50 meetings.

22. After the Forest Service formally accepted the ASR proposal in September of 2002, the agency initiated the National Environmental Policy Act ("NEPA") scoping process by releasing the pro-

posed action to the general public on September 23, 2002. The Forest Service mailed the NEPA scoping notice to hundreds of community residents, interested individuals, Indian tribes, public agencies, and other organizations.

23. As a result of the NEPA scoping notice, approximately 1,200 comment letters were received and evaluated by the Forest Service.

24. The Forest Service released the Draft Environmental Impact Statement ("DEIS") to the public, including the Plaintiff tribes, on February 2, 2004, and announced that the preferred alternative included snowmaking with Class A+ reclaimed water from the City of Flagstaff's Rio de Flag Water Reclamation Plant.

25. As a result of the DEIS, the Forest Service received and evaluated close to 9,900 comments.

26. As part of its environmental analysis, the Forest Service gave detailed consideration to three alternatives: the No Action Alternative (Alternative One); the Preferred Alternative (Alternative Two); and a no snowmaking alternative (Alternative Three).

27. The Forest Service found that Alternative Two best met the purposes and needs of the proposed action.

28. The Forest Service considered at least nine additional alternatives, including: reducing the level of snowmaking, fewer upgrades, closing the Snowbowl altogether, and using potable water rather than reclaimed water for snowmaking. The Forest Service determined that these alter-

natives did not warrant detailed evaluation, or were not feasible.

29. In February of 2005, the Forest Service issued the Final Environmental Impact Statement ("FEIS") and the Coconino National Forest Supervisor signed the Record of Decision ("ROD") approving Alternative Two.

30. The Plaintiffs appealed the Forest Supervisor's decision on April 25, 2005. Accordingly, the Forest Service's Southwestern Regional Office arranged a technical review team to evaluate the administrative appeals.

31. On June 8, 2005, the Forest Service responded to and denied these appeals. In pertinent part, the Forest Service denied Plaintiffs' claims that the project would have a substantial burden on their ability to practice their religion.

32. Under the ROD, the Snowbowl facilities improvements include realignment and/or lengthening of three existing chair lifts; installation of one new chair lift and four surface lifts; development of new ski terrain, increasing the ski acreage within the SUP area from approximately 138 acres to approximately 204 acres; development of a new snowplay/tubing area, with associated improvements to parking and guest service facilities; installation of snowmaking infrastructure to cover approximately 204 acres of the SUP; and improvements to other service facilities and ski area infrastructure, such as lodges.

33. With the exception of the snowplay facility and the snowmaking, the infrastructure improvements authorized by the Forest Service are comparable to those first authorized by the

Forest Service in 1979 and upheld in *Wilson*. For example, the 2005 Snowbowl decision and the 1979 decision both approved about 205 acres of skiable terrain and facilities to comfortably support 2,825 skiers at one time.

34. The authorized skiable terrain remains at just over 200 acres and the Snowbowl's comfortable carrying capacity ("CCC") remains unchanged at 2,825 skiers at one time, as previously approved by the Forest Service in 1979.

35. The area proposed for snowmaking is approximately one quarter of one percent (1%) of the Peaks.

36. All authorized improvements will occur within the existing 777-acre SUP area, with the exception of a 14.8 mile buried reclaimed water pipeline that will be constructed within existing road or utility right-of-ways.

37. The pipeline will also be equipped with fire hydrants to provide a water source for fire suppression needs within the rural residential areas between Flagstaff and the ski area as well as to fight forest fires. Likewise, a reservoir of water will be maintained at the ski area and will be available for forest fire suppression.

38. The snowplay facility will address safety issues associated with snowplay on the trails within the SUP that conflicts with downhill skiers, as well as unmanaged snowplay and unauthorized parking along Snowbowl Road that the Forest Service has had a long time interest in addressing.

39. The upgrades to existing trails and other features, including snowmaking, will improve safety

conditions and minimize the potential for accidents at the Snowbowl.

40. The snowmaking component of the Snowbowl upgrades includes the use of reclaimed water from the Rio de Flag WRF. The WRF is a tertiary water reclamation facility, also known as an advanced treatment facility.

41. To ensure that reclaimed water is used safely without adversely affecting public health or environment, the Arizona Department of Environmental Quality ("ADEQ") has established five water categories (A+, A, B+, B, C) specifying the minimum levels of treatment and water quality criteria.

42. Reclaimed water that has been treated at the WRF is categorized as Class A+ water, which is the highest quality of reclaimed water classified by the ADEQ.

43. The Class A+ water proposed to be used in the snowmaking by the Snowbowl is therefore the highest grade of reclaimed water recognized under Arizona statutes and regulations. Class A+ reclaimed water has been approved for use in snowmaking by the ADEQ.

44. The level of treatment and the water quality criteria required for use of reclaimed water depends upon the expected degree of human, animal, and plant contact. Pursuant to the ADEQ's regulations, the reclaimed water to be used at the Snowbowl will undergo specific advanced treatment requirements, including tertiary treatment with disinfection. In addition, the reclaimed water will comply with specific monitoring requirements, including frequent

microbiological testing to assure pathogens are removed, and reporting requirements.

45. Reclaimed water from the WRF is subject to a variety of tests to ensure that the water is adequately treated to remove bodily fluids, such as blood.

46. Reclaimed water from the WRF must comply with extensive treatment and monitoring requirements under three separate permit programs: the Arizona Pollutant Discharge Elimination System ("AZPDES") Permit, the Arizona Aquifer Protection Permit Program, and the Water Reuse Program. Additionally, industrial facilities in the City of Flagstaff are required to comply with the city's Industrial Pre-Treatment requirements.

c. Plaintiffs' Religious Beliefs and Practices on the Peaks

47. Certain Indian religious ceremonies are conducted on the Peaks, such as the Navajo Blessingway Ceremony, and certain plants, water and other materials are collected from the Peaks for Navajo medicine bundles and other tribal healing ceremonies.

48. The Plaintiff tribes believe that the Peaks is a living entity and that the presence of the Snowbowl desecrates the mountain.

49. Certain practitioners believe that the alleged desecration of the Peaks has caused many ills to mankind, including attacks on 9/11/01, the Columbia Shuttle crash, and the increase in natural disasters, such as recent hurricanes, tornados, and the tsunami.

50. Certain practitioners believe that upgrades to the Snowbowl will result in further ills and will harm their beliefs.

51. Certain practitioners believe that upgrades to the Snowbowl will jeopardize the continuation of their religion.

52. Native practitioners also believe that certain deities, such as Kachina or Ga'an, dwell on the Peaks, and that snowmaking (irrespective of the source of water) will negatively impact the deities, potentially causing drought or other suffering.

53. Certain practitioners also believe that the Class A+ reclaimed water from the City of Flagstaff to be used for snowmaking contains the souls of the dead because the city hospital, morgue and mortuary contribute minor amounts to the discharge from the Rio de Flag WRF and that the use of the reclaimed water will affect the purity of the Peaks.

54. Although the Indian tribes and their members differ in their use of the Peaks for religious purposes and have different views on how to best manage the area, the Plaintiff tribes and their members do hold the uniform beliefs that the Peaks are sacred, and this project should not be allowed to move forward to further desecrate their sacred mountain.[17]

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[17] While there is evidence to suggest that the Peaks may be more sacred to some of the tribes than to others, the Court need not make such a finding.

55. The Plaintiff tribes have not identified any shrines, trails or cultural resources located within the 777-acre SUP area.

56. The Plaintiff tribes acknowledged that they have shrines and specific places where ceremonies are conducted in other areas on the Peaks, including within the Kachina Peaks Wilderness area.

57. Tribal beliefs, ceremonies and practices have not changed since 1983 when some of the upgrades authorized by the 1979 Forest Service decision were implemented.

58. The Forest Service called two archaeologists as witnesses: Dr. Judith Propper and Heather Provencio. Dr. Propper and Ms. Provencio discussed their understanding of how the tribes subjectively perceive the Snowbowl project. Dr. Propper is the Regional Archaeologist for the Southwestern Region of the Forest Service. Ms. Provencio is the Forest Service Zone Archaeologist for the Peaks and the Mormon Lakes Districts; She was the lead archaeologist for the tribal consultation on the Snowbowl proposal.

59. Dr. Propper agreed that the tribes view the Peaks: (a) as a home of spiritual beings; (b) a place where significant mythological events occurred; (c) a place where spirits of the dead went to be changed into bringers of rain; (d) a personification of gods and goddesses; (e) an area where important societies originated; and (f) as a source of life.

60. Dr. Propper testified that although practitioners sincerely felt that the Forest Service decision would impact their beliefs and exercise of relig-

ion, the impacts did not amount to a substantial burden.

61. Ms. Provencio testified that the types of Native American religious practices that occur on the Peaks range from the collection of traditional plants, for ceremonial, traditional and medicinal use, to members actually conducting healing ceremonies and religious ceremonies on the Peaks.

i. Navajo Plaintiffs

62. The Navajo Nation has approximately 225,000 members and is the largest federally recognized Indian Tribe in the United States. The Navajo Nation covers the corners of three states, Arizona, New Mexico and Utah, consisting of 27,635 square miles. The Navajo Nation lies to the north and east of the Peaks.

63. Navajo Nation President, Joe Shirley, the Historic Preservation Department Assistant Manager, Steven Begay, and Larry Foster, member of the Navajo Nation, testified on behalf of the Navajo Nation.

64. The Peaks are one of four mountains sacred to the Navajo people. In the Navajo religion, the creation of the Navajo people took place at the Peaks. Accordingly, the Peaks are considered in Navajo culture and religion to be the "Mother of the Navajo People," their essence and their home. The whole of the Peaks is the holiest of shrines in the Navajo way of life.

65. The Peaks are home to many of the Navajo people's deities, including White Corn Girl, White Corn Boy, Twilight Girl, Twilight Boy, and Yellow Wind.

66. The Snowbowl upgrades will not interfere with or inhibit any religious practice of the Navajo Plaintiffs. Although the witnesses generally testified that the Peaks were central and indispensable to the Navajo way of life, President Shirley and Mr. Begay pro-vided no evidence that they use the Snowbowl SUP area for any religious purpose.

67. The Snowbowl SUP area is not the exclusive site of any Navajo religious activities. All plants and wildlife used by the Navajo Plaintiffs for religious purposes are available outside the SUP area.

ii. Plaintiff Norris Nez ("Plaintiff Nez")

68. Plaintiff Nez is a Navajo medicine man who testified as a named Plaintiff.

69. The SUP area is not the exclusive location for any religious activities. All plants and wildlife that Mr. Nez uses for religious purposes are available outside of the SUP and, in fact, Mr. Nez collects plants outside of the SUP area.

70. Mr. Nez has never been denied access to any part of the Peaks in relation to the practice of his religion.

71. The Snowbowl upgrades will not inhibit the religious practices of traditional Navajo practitioners or prevent Plaintiff Nez from engaging in religious conduct.

iii. White Mountain Apache Plaintiffs

72. The White Mountain Apache ("WMA") is a federally recognized Indian tribe with more than 12,600 members. The reservation is located in east central Arizona in portions of Navajo,

Apache and Gila counties. It measures 75 miles long and 45 miles wide, comprising more than 1.6 million acres.

73. The WMA Plaintiffs presented testimony of Ramon Riley, the Cultural Resource Director for the WMA and Dallas Massey, the Chairman of the WMA, neither of whom have ever been to the Snowbowl SUP area.

74. The four mountains sacred to the WMA are the Black Mountain (Mount Baldy), the Turquoise Mountain (Mount Graham), the Red Mountain (Four Peaks), and the White Mountain (the San Francisco Peaks).

75. Two of the religious ceremonies in which the Peaks play a role are the Sunrise Ceremony and the ceremonies performed by Crown Dancers. The Sunrise Ceremony is a right of passage for young ladies who go from adolescence to womanhood. The Crown Dancers perform healing ceremonies "used to heal people."

76. Mr. Riley testified that the proposed project will have a large negative impact on the ability of the Apache people to perform the Sunrise Ceremony allowing a young lady to pass into womanhood and the Crown Dancer ceremonies. "Some of the medicine people, including myself, will lose focus. Our medicine [and] our prayers [are] not going to be strong."

77. Although Mr. Riley testified to the devastating impacts the Snowbowl upgrades will have on his culture, neither he nor the WMA Plaintiffs presented evidence that the Snowbowl upgrades will interfere with or inhibit any particular religious practice. For example, plants collected by the

members of the WMA for religious purposes, such as "white medicine," are available throughout the Peaks.

78. Portions of the WMA reservation, considered sacred by tribal members, are dedicated to recreational uses. For example, the White Mountains, considered sacred to some members of the WMA, are home to the Sunrise Ski Resort that is owned and operated by the WMA.

79 The water used for snowmaking at Sunrise is derived from Ono Lake and is, in part, reclaimed water. Sunrise has a permit to discharge treated wastewater into Ono Lake.

80. The WMA are currently planning to expand the snowmaking capabilities at Sunrise.

81. Although there are technically four ski areas in the state of Arizona, Sunrise and the Snowbowl are the two largest.

82. The WMA Plaintiffs would prefer complete removal of the Snowbowl ski facilities. Specifically, the WMA Plaintiffs would oppose the Snowbowl upgrades even if fresh water was used to make snow. Moreover, the WMA Plaintiffs are opposed to any upgrades that would alter the terrain, even upgrades proposed for safety reasons.

iv. Plaintiff Bill Bucky Preston (Plaintiff Preston)

83. Plaintiff Preston is a member of the Hopi Tribe who testified as a named Plaintiff in this case. During trial, Plaintiff Preston chose not to discuss his specific role in the Hopi community. Specifically, Plaintiff Preston was unable to

disclose many of his specific religious beliefs due to their sacred nature.

84. Plaintiff Preston failed to demonstrate that the Snowbowl upgrades will interfere with or inhibit any religious practices that he may perform. In fact, Plaintiff Preston would not respond to questions about his specific religious activities.

85. Plaintiff Preston does not conduct any religious activities within the SUP area. Plaintiff Preston testified that the Snowbowl's presence on the Peaks prevents him from doing so.

86. All plants and wildlife that Preston uses for religious purposes are available outside the SUP area. In fact, Plaintiff Preston collects plants and wildlife outside the SUP area.

v. Hualapai Plaintiffs

87. The Hualapai Tribe is a federally recognized Indian tribe with more than 1,500 members. The Hualapai Reservation, created by Executive Order in 1883, presently comprises approximately 185,000 acres in the Northwestern Arizona Counties of Coconino, Mojave and Yavapai. The northern boundary of the reservation is the middle of the Colorado River within the Grand Canyon. The Tribal Capitol is located in Peach Springs, Hualapai Reservation, Arizona, approximately 95 miles west of the Peaks.

88. Frank Mapatis, a traditional practitioner and Charles Vaughn, Chairman of the Hualapai Tribe, testified on behalf of the Hualapai Tribe.

89. The Hualapai Plaintiffs presented no evidence that they conduct religious activities within the SUP area. All plants and wildlife that the

Hualapai Plaintiffs use for religious purposes are available outside the SUP area. In fact, the Hualapai Plaintiffs collect plants and wildlife outside the SUP area.

90. Mr. Mapatis collects plants from the Peaks once a year as part of his religious beliefs, but he does not collect plants within the SUP area.

91 Mr. Mapatis does not collect water from within the SUP area; however, Mr. Mapatis believes that water travels down the mountain, through the SUP area, to springs and seeps where water is collected for ceremonial purposes and for healing the sick.

92. Mr. Mapatis does not leave offerings within the SUP area.

93. Previous forest management activities on the Peaks, such as road construction, cell tower construction, and the operation of sewage septic systems have not inhibited Mr. Mapatis' religious practices.

94. Since 1983, when the D.C. Circuit upheld the original EIS for the development of the Snowbowl ski area, the number of practitioners of the Hualapai Tribe's religion has increased.

95. The Hualapai Plaintiffs failed to demonstrate that snowmaking authorized by the Snowbowl upgrades will impact the water collected from the Peaks by traditional practitioners.

96. The Hualapai Plaintiffs did not present evidence demonstrating that members have ever been or will be denied access to the Peaks to conduct religious activities.

97. The Hualapai Tribe has undertaken activities that impact the religious practices of its own members. For example, some members of the Hualapai Tribe oppose the Sky Walk Project, a multi-million dollar expansive recreational development project in the Grand Canyon, which is considered to be sacred. As part of the Sky Walk Project, a tourist center will be built on the edge of the Grand Canyon along with a sky walk that extends over the canyon enabling visitors to look down into it.

vi. Plaintiffs Havasupai Tribe, Rex Tilousi, and Diana Sue Uqualla

98. The Havasupai are a federally recognized Indian tribe with over 600 enrolled members. The Havasupai Reservation consists of 188,077 acres of canyon land and broken plateaus abutting the western edge of the Grand Canyon's south rim. The Havasupai Tribe's main village is Supai, and it is located in the bottom of the Grand Canyon. A majority of the tribal members reside in Supai.

99. Havasupai Tribe Chairman Rex Tilousi ("Plaintiff Tilousi") and Havasupai Vice-Chair Diana Sue Uqualla ("Plaintiff Uqualla") testified as named Plaintiffs. Roland Manakaja, Cultural Resources Director for the Havasupai Tribe, testified on behalf of the Havasupai Plaintiffs.

100. The Peaks were included within the Havasupai Tribe's traditional territory, and they traditionally exercised caretaker responsibility for the Peaks which the other tribes in the region acknowledged.

101. For the Havasupai, the Peaks are the origin of the human race; it is the point of their creation.

Specifically, they believe that the water from the Peaks impregnated their Grandmother by the Sun Father melting the snow on the Peaks.

102. The Havasupai traditional practitioners pray to the Peaks and visit them spiritually daily. Furthermore, traditional practitioners of the Havasupai religion deem the entirety of the Peaks as one living being and that portions of the mountain cannot be carved out from the whole.

103. The Havasupai Plaintiffs believe that the act of snowmaking modifies the seasons and is considered a profane act; however, the Havasupai Plaintiffs did not present evidence that the Snowbowl project will inhibit the religious practices of the tribe or penalize members of the tribe for practicing their religion.

104. The Havasupai Plaintiffs did not present evidence that any member of the tribe conducts religious or cultural activities within the SUP area.

105. The Havasupai Tribe have gathered from the Peaks ceremonial items, food, water and fallen trees for fuel for hundreds of years and still use such articles today. However, the Havasupai Plaintiffs did not present evidence that members collect plants, rocks, or trees from within the SUP area.

106. The SUP area is not the exclusive location of any plants, such as aspen trees and pinyon pines, that Havasupai tribal members use for religious purposes. Volcanic rocks that are collected for religious purposes are also widely available throughout the Peaks. In addition, the SUP area

is not the exclusive location for any wildlife that are used for religious purposes

107. The Havasupai Plaintiffs did not present evidence permitting the Court to find that water from the snowmelt at the Snowbowl ski area will go to Havasu Creek, over 60 miles away.

108. Snowmelt at the Snowbowl ski area is highly unlikely to run off as surface water for any great distance. Even if surface water were to run off from the Snowbowl ski area, it would flow mainly within the Little Colorado surface water drainage basin, the same basin where treated water from Rio de Flag is discharged.

109. Snowmelt from the Snowbowl area that does not evaporate or sublimate is expected to infiltrate downward through the subsurface below the perched groundwater systems. The infiltrated snowmelt would not likely be a source of water to springs located downslope of the Snowbowl ski area.

110. Snowmelt from the Snowbowl ski area that infiltrates the regional Coconino Aquifer ("C-Aquifer") would likely move north toward Blue Springs or toward the boundary of the groundwater drainage basin east of the Mesa-Butte fault, at which point the water would infiltrate down into the other regional aquifer known as Redwall-Muave Aquifer ("R-Aquifer").

111. Groundwater within the R-Aquifer will not move across the Mesa-Butte fault because the uplifted westward side of the fault has a damming effect and because the movement of water along the fault in the northeast and southwest direction will direct the movement of water to the north-

east and southwest, away from Supai Village. The Mesa-Butte fault is a conduit for flow along the fault, causing water in the R-Aquifer to move along the fault - to the north, toward Blue Springs or south to the Verde area - away from Supai Village.

112. Havasupai Plaintiffs, Plaintiff Tilousi, and Plaintiff Uqualla did not present convincing evidence to allow the Court to find that the quality of the water at Supai Village will be affected by the use of reclaimed water for snowmaking at the Snowbowl ski area.

113. Water quality concerns at the Havasupai Tribe's reservation are unrelated to the Snowbowl upgrades. There have been problems with the lagoon system that manages wastewater from within Supai Village. The wastewater in the Supai Village lagoon system, which includes several unlined lagoons, does not receive any chemical or ultraviolet treatment. Plaintiff Uqualla admitted that it is reasonably likely that the untreated wastewater in these unlined lagoons will infiltrate into the ground.

114. Whereas Plaintiff Tilousi admitted that the Havasupai Tribe is most concerned with protecting Supai Village; the Havasupai Plaintiffs have used water reclaimed from this lagoon system to irrigate alfalfa sprout crops in Supai Village.

115. The Havasupai Plaintiffs are currently interacting with the United States Environmental Protection Agency regarding the management of solid waste in Supai Village. Previously, the Havasupai Plaintiffs buried or burned their solid

waste trash, but have recently discovered that they must undertake a closure.[18]

116. The Havasupai Plaintiffs, Plaintiff Tilousi, and Plaintiff Uqualla did not present evidence that the Snowbowl Upgrade Project will cause flooding in Supai Village.

vii. Hopi Plaintiffs

117. The Hopi are a federally recognized Indian tribe with approximately 12,000 members. The Hopi Reservation is located in the high deserts of northeastern Arizona and is surrounded by the Navajo Nation. The Hopi Reservation measures 2,438 square miles.

118. The Hopi Plaintiffs presented testimony from four witnesses: Cultural Preservation Office Director Leigh J. Kuwanwisiwma, Hopi practitioner Wilton Kooyahoma, Hopi practitioner Antone Honanie, and Research Archaeologist and Hopi practitioner Emory Sekaquaptewa.

119. The Hopi Tribe's spiritual and physical connection to the Peaks goes back as far as their oral traditions – at least as long as the Hopi and their ancestors have lived in northern Arizona.

120. The Peaks are of central importance to the Hopi tradition, culture and religion. There is a direct relationship between the Hopi way of life and the environment, including the Peaks. The Peaks mark a cardinal direction defining the Hopi universe, the spiritual boundaries of the Hopi way.

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[18] The use of the term "closure" in the above finding of fact means the permanent closing of a landfill used to burn or bury solid waste.

121. The Peaks are known to the Hopi as Nuvatukya'ovi – the "Place of Snow on the Peaks." The Peaks are where the Hopi direct their prayers and thoughts, a point in the physical world that defines the Hopi universe and serves as the home of the Kachinas, who bring water, snow and life to the Hopi people.[19]

122. There are more than 40 kivas located throughout the 12 Hopi Villages. The kivas are the focal point of all religious activity in the Hopi Villages and the central place to which the Kachina gather during their annual pilgrimage to and sojourn among the Hopi.

123. The Hopi Tribe's religious practices and their close spiritual tie to the tribe's home and sacred landscape constitute the fabric of the Hopi way, a way of perceiving and responding to the realities of daily life. The individual Hopi's practice of the Hopi way permeates every part and every day of the individual's life from birth to death.

124. To the Hopi, the Peaks are the residence of the Kachina, spiritual deities of the Hopi who travel from the Peaks to the Hopi Reservation to participate in traditional Hopi kiva practices and dances in response to petitions and prayers from the Hopi who are members of each kiva.

125. The Kachinas serve many purposes, among them is to teach lessons to the Hopi and warn them of the consequences of their improper actions.

126. Kachina songs teach messages on the principals that a community must live by to stay viable,

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[19] The terms "Kachina" and "Katsina" are synonymous and were used interchangeably during the course of the trial.

and for the Hopi, to achieve their destiny. Hopi children are taught these songs, "[s]o that they can remember the words as they do their work and play in life."

127. The Hopi calendar connects the months and seasons in the Hopi year, the coming and going of the Kachina from the Peaks, and the ceremonies performed in the kivas on the Hopi Reservation. Thus for the Hopi, the Kachina define the passing of the months and the continuity of the Hopi culture.

128. The Hopi Plaintiffs testified that the proposed upgrades to the Snowbowl have affected and will continue to negatively affect the way they think about the Peaks, the Kachina and themselves when preparing for any religious activity involving the Peaks and the Kachina – from daily morning prayers to the regular calendar of religious dances that occur throughout the year.

129. The Hopi Plaintiffs also testified that this negative effect on the practitioners' frames of mind due to the continued and increased desecration of the home of the Kachinas will undermine the Hopi faith and the Hopi way. According to the Hopi, the Snowbowl upgrades will undermine the Hopi faith in daily ceremonies and undermine the Hopi faith in their Kachina ceremonies as well as their faith in the blessings of life that they depend on the Kachina to bring.

130. Although the Hopi Plaintiffs' testified about the important role that the Kachinas and Kachina songs play in Hopi religion, they presented no evidence that the Snowbowl upgrades would impact any exercise of religion related to the

Kachinas or the Kachina songs. The Kachinas have continued to come to the Hopi villages since the establishment of the Snowbowl ski area in the late 1930s, and since the Forest Service approved the expansion of the Snowbowl in 1979.

131. Plaintiffs' witness Mr. Kooyahoma stated that despite the Snowbowl upgrades, the Kachinas will continue to come to the Hopi villages. Mr. Sekaquaptewa agreed that the Hopi will continue to conduct religious activities on the Peaks, such as the collection of Douglas fir and tobacco.

132. The Hopi Plaintiffs presented evidence that the Snowbowl upgrades are contrary to their beliefs, and that making artificial snow will affect them "emotionally"; however, the Hopi Plaintiffs provided no evidence that the decision would impact any religious ceremony, gathering, pilgrimage, shrine, or any other religious use of the Peaks. The Hopi Plaintiffs presented no evidence that they use the Snowbowl SUP for any religious purpose.

viii. Plaintiff Yavapai-Apache Nation

133. The Yavapai-Apache Nation is a federally recognized Indian tribe consisting of approximately 1,550 enrolled members. The 636-acre Yavapai-Apache Reservation is located in the Verde Valley in central Yavapai County, Arizona.

134. The Yavapai-Apache Plaintiffs offered the testimony of only one witness: Tribal Council member Vincent E. Randall.

135. The four sacred mountains to the Yavapai-Apache Nation are the Peaks, the Red Mountain

just south of Fort McDowell, Pinal Mountain, and the eastern Mount Baldy in New Mexico.

136. The Yavapai-Apache Nation view the Peaks as one living being and believe that the use of reclaimed water for snowmaking may make the mountain impotent.

137. Although the Yavapai Apache members collect medicine at the Peaks, the YavapaiApache Plaintiffs presented no evidence that they use the Snowbowl SUP for any religious purpose.

138. Mr. Randall discussed certain Apache beliefs and ceremonies; however, he did not provide evidence that the Snowbowl project would impact any discernable religious exercise.

139. Mr. Randall testified that four or five Yavapai-Apache members collect herbs on the Peaks; however, these holy herbs occur all over the Peaks and not exclusively in the SUP area. The Snowbowl decision would not prohibit the collection of these herbs in any way.

d. Compelling Governmental Interest

140. National Forests must be managed for multiple uses. *See* National Forest Management Act, 16 U.S.C. §§ 1600 et seq. ("NFMA"). Specifically, Congress has mandated that the Forest Service manage the National Forests for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes."

141. In addition to NFMA, the Forest Service must consider a variety of other federal laws and executive orders in managing the CNF, including but not limited to NEPA, the NHPA, the ESA, the National Forest Ski Area Permit Act, the

Wilderness Act, 16 U.S.C. §§ 1131, *et seq.*, and the Multiple-Use Sustained Yield Act, 16 U.S.C. §§ 528- 531.

142. National Forest Service Plans provide guidance for the management of the National Forests. Every National Forest must prepare a Forest Plan in accordance with NFMA. Forest Plans are subject to the requirements of NEPA. Therefore, a public review and comment period is provided for every Forest Plan.

143. After a lengthy public review and comment period, the Coconino Forest Service Plan was approved in 1987. The Coconino Forest Service Plan provides for integrated multiple-use and sustained yield of goods and services from the forest in a way that maximizes long-term public benefits in an environmentally sound manner.

144. The CNF's Peaks Ranger District, which is home to the Peaks, has a diversity of vegetation types and geography. The cultural resources on the Peaks Ranger District are also diverse, ranging from lithic scatters to prehistoric and habitation sites to the "paramount cultural resource" of the Peaks.

145. The Coconino Forest Service Plan calls for various future uses, including recreational and wilderness uses. The Forest Plan also specifically adopted several prior management decisions, including the Environmental Impact Statement for the Arizona Snowbowl and the prior allocation of areas with the CNF as Wilderness.

146. The Coconino Forest Service Plan designates 37 MAs within the CNF. Each MA is subject to specific management guidelines. The MA desig-

nations in the Coconino Forest Service Plan accommodate a variety of uses and users, such as cattle and sheep grazing, power lines, gas lines and mining. The Navajo Nation, which grazes cattle on the northern slopes of the Peaks is one such user.

147. Pursuant to the Coconino Forest Plan, the Peaks Ranger District is managed for a variety of uses, including wildlife, timber, livestock grazing, and outdoor recreation. The Forest Service and, more specifically, the Forest Supervisor have a responsibility to all of the users of the CNF.

148. The Forest Coconino designates the Snowbowl SUP area as MA-15 (i.e., Developed Recreation Sites) and therefore, directs that the Snowbowl SUP area be managed as a developed ski area.

149. The SUP for the Arizona Snowbowl reflects the decision of the Forest Service to operate and maintain the ski area for 40 years. The SUP also directs the Forest Service's management of the SUP area.

150. The need to manage National Forests for multiple uses is complicated by the sheer number of sites that are considered to be sacred by tribes.

151. The Southwestern Region of the National Forest regularly consults with about 50 tribes who have traditional use and ancestral ties to National Forests. The Region consults with tribes on 900 to 1,000 projects each year.

152. On National Forest lands within Arizona and New Mexico alone there are at least 40 to 50 mountains that are generally considered sacred by tribes. Pursuant to the agency's multiple-use

mandate, these mountains are managed for recreational use, wildlife purposes, forest health purposes, special uses ranging from pipelines to summer homes, and wilderness values.

153. In the CNF, almost a dozen mountains have been identified by tribes as being sacred. In additions, tribes find other landscapes to be sacred, including canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes and rock formations. There are additional areas considered to be sacred by tribes such as shrines, gathering areas, pilgrimage routes and prehistoric sites. Between 40,000 and 50,000 prehistoric sites have been inventoried within the Southwestern Region forest lands.

154. Including the Snowbowl, the National Forests in the Southwestern Region are home to eleven ski areas, several of which are located on or near areas that are sacred to tribes.

155. Millions of acres of public land–Forest Service lands and other federal lands–are considered sacred to Plaintiffs.

156. There are likely thousands of sites and shrines that are sacred to the Hualapai Tribe. The Hualapai Plaintiffs consider the entire Colorado River to be sacred.

157. Within the Navajo Nation's four cardinal mountains, all of which are located on federal land, there are several thousand sacred sites. For example, the Navajo Plaintiffs consider the entire Colorado River — from the headwaters to Mexico — and the Little Colorado River to be sacred.

158. There are thousands of sites considered to be sacred to the Havasupai Plaintiffs. For example, the Havasupai Plaintiffs consider 277 miles of the Colorado River to be sacred.

159. There are hundreds of sacred Hopi sites and shrines throughout the American Southwest, with some as far away as Ohio. There are more than 10,000 archeological sites that have specific Hopi clan traditions tied to them.

160. Moreover, new sacred areas are continuously being created.

161. The management decisions of the Plaintiff tribes with respect to their own lands suggest that the Plaintiff tribes face similar complications.

162. For example, land on the WMA Plaintiffs reservation, which is considered sacred by members of the tribe, is allocated to a variety of uses. Some portion of the reservation is managed as a "closed area," where developed recreation is not permitted and other portions of the WMA reservation are dedicated to recreational uses. Recreational activities on the reservation include 7,000 camp sites, hiking trails, fishing, hunting, boating, guided white water rafting tours, rodeos, and skiing. According to Chairman Massey, recreation can be a positive influence on people's lives, especially tribal youth.

163. Also, the White Mountains, considered sacred to members of the WMA, are home to the Sunrise ski resort, which is owned and operated by the WMA Tribe. In fact, the Sunrise ski resort relies upon artificial snowmaking, and the water source for this snowmaking is, in part, reclaimed water. Many WMA spiritual leaders consider the

presence of the Sunrise ski resort on the White Mountains to be a desecration.

164. Reclaimed water is used by many of the Plaintiff tribes. The Navajo Nation uses reclaimed water for irrigation, for dust control at construction sites, and for soil compacting on dirt roads.

165. The White Mountain Apache Tribe used reclaimed water as part of the Canyon Day Irrigation Project, and currently uses reclaimed water in its stock pond at the Hon-Dah casino. The Yavapai-Apache Nation has used reclaimed water to irrigate the grounds around Cliff Castle Casino in Camp Verde, Arizona. The Havasupai Plaintiffs have used reclaimed water from a lagoon system, which does not provide any chemical or ultraviolet treatment, to irrigate alfalfa sprout crops in Supai Village.

166. Also, mining is conducted on Black Mesa although the Navajo Nation and the Hopi Tribe consider it to be sacred. The Hopi Tribe transferred Hopi water rights in order to provide water for a coal slurry pipeline at Black Mesa.

167. Wastes from medical clinics on the reservation are disposed in lagoons or on the ground at the Navajo reservation, which is considered sacred.

i. Safety

168. The Snowbowl upgrades have a number of features that would address the CNF's safety concerns.

169. Upgrades were needed because the existing terrain is insufficient for current use levels, which leads to overcrowding and safety issues on peak-

attendance days, especially given the area's high utilization rates.

170. When snow levels permit operation, the Snowbowl significantly exceeds the ski area's comfortable carrying capacity of 2,825 guests. Over the past 10 seasons, average peak day attendance has been approximately 3,434 guests.

171. The Snowbowl upgrades will address safety issues associated with overcrowding on the ski slopes by providing more skiable acreage, providing more novice and intermediate ski terrain, and enabling the owners of the Snowbowl ski area to make improvements to narrow trails with congestion problems.

172. Adding additional ski terrain will permit skiers to spread out across the slope and reduce some of the safety concerns related to overcrowding.

173. The Forest Service identified a need to respond to unregulated snowplay activities on the National Forest System lands on and around the Snowbowl. The Forest Service explained that people seeking to sled, slide, and saucer have historically done so on unmanaged areas of the CNF along Snowbowl Road and along Highway 180. These activities have lead "to injuries, traffic management issues, garbage, and sanitation problems."

174. The snowplay area included in the Snowbowl Upgrade Project responds to these safety concerns.

175. Snowbowl Road was designed with pullouts in order to facilitate tribal members' access to forest areas used for cultural purposes.

ii. Compliance with the Establishment Clause

176. The CNF requires the ongoing management of 1.8 million acres for a variety of users and uses.

177. Conflicts associated with allocation of forest resources between the various uses and users is inevitable.

178. Nevertheless, the Forest Service has sought to accommodate the religious activities of the Plaintiff tribes. In fact, the Forest Service has sometimes even facilitated the religious practices of the Plaintiff tribes.

179. The Forest Service participated in efforts to cease mining activities at the White Vulcan Mine, a pumice mine that operated on the Peaks for about a half-century.

180. The Forest Service successfully sought to designate 19,000 acres surrounding the SUP area as the Kachina Peaks Wilderness, thus protecting the area from future development. Tribal members use the Kachina Peaks wilderness to conduct religious ceremonies and practices. The Hopi Plaintiffs agreed that the Kachina Peaks Wilderness is a benefit to Hopi culture.

181 The Forest Service is also currently in the process of nominating the Peaks to the National Register of Historic Properties as Traditional Cultural Property.

182. Members of the general public must pay to remove forest products, such as plants, from the Peaks. Tribal members can remove those same forest products for religious purposes for free.

183. When the Forest is closed due to fire risk, the CNF ensures tribal access for ceremonial and other religious purposes.

184. The east side of the Peaks has the highest archeological site density because it has more favorable farming conditions. The Snowbowl SUP is located on the west side.

185. The Forest Service accommodated Hopi concerns by requiring the owners of the Snowbowl ski area to limit public access to the top of the Peaks.

186. The Forest Service would be hard pressed to satisfy the religious beliefs of all Plaintiffs.

187. For example, the Navajo Plaintiffs' official position is that the Snowbowl should be shut down completely. The Navajo Plaintiffs would oppose snowmaking at the Snowbowl even if the snow was made from fresh water. In fact, the Navajo Nation opposes any upgrades at the Snowbowl, even those designed to improve safety.

188. Plaintiff Preston expressed his belief that there should be no development whatsoever on the Peaks and would, therefore, oppose snowmaking at the Snowbowl even if fresh water was used.

189. According to Plaintiff Tilousi, any actions that disturb life, "whether plant life, wildlife, the earth, the air, [or] the waters" would be objectionable. However, there is less concern when an area has already been disturbed.

190. In conclusion, the Snowbowl upgrades satisfy the government's interest in managing the CNF for multiple uses, in ensuring the safety of visitors to the Snowbowl ski area, and in complying with the Establishment Clause.

c. Least Restrictive Means

191. The Forest Service also sought to identify tribal concerns with the proposed Snowbowl upgrades in order to seek ways to mitigate, minimize, or avoid potential impacts.

192. After over a dozen cultural resources surveys and decades of consultation with tribes regarding the cultural and religious significance of the Peaks, tribal members have not identified any specific plants, springs, natural resources, shrines or locations for ceremonies in the SUP area that will be impacted–much less substantially burdened–by the Snowbowl improvements.

193. The Forest Service removed night lighting from the project, in response to opposition from the Navajo, Hopi, and Yavapai-Apache Plaintiffs.

194. The Forest Service contacted thirteen tribes, the Medicineman's Association, and several Navajo Nation chapter houses regarding the development of a Memorandum of Agreement ("MOA").

195. In the process of developing the MOA, the Forest Service sought the input of the thirteen tribes, the Medicineman's Association and the chapter houses to determine whether the potential and perceived tribal impacts could be mitigated, minimized or avoided.

196. Snowmaking would provide for a consistent operating season and enable the Forest Service to continue the operation of the ski area as a Developed Recreation Area in accordance with the Coconino Forest Service Plan. Moreover, snowmaking at ski areas is not uncommon.

197. Four tribes signed the MOA, including the Hualapai Plaintiffs and the Yavapai-Apache Plaintiffs. While signing the MOA does not necessarily indicate that the Hualapai Plaintiffs and the Yavapai-Apache Plaintiffs approved the Forest Service's decision, it does indicate the Forest Service's efforts to deal with adverse effects.

198. The agency guaranteed, in the MOA, that access to the Peaks, including the SUP, for cultural and religious uses would be protected. Pursuant to the terms of the MOA, the Forest Service also committed to work to ensure that tribal ceremonial activities conducted on the Peaks continue uninterrupted.

199. Also, under the MOA, the Forest Service agreed to work with the tribes to provide periodic inspections by tribal representatives to examine the condition of existing shrines and other existing traditional cultural places on the Peaks.

200. The Forest Service will continue to guarantee traditional cultural practitioners access within and outside the SUP area for traditional cultural uses, such as collection of medicinal, ceremonial, and food plants.

201. Should any plants of traditional importance be subsequently identified within the project area, the Forest Service will encourage and protect the natural regeneration of those plants when developing site-specific plans.

202. The Forest Service also agreed to continue working with tribal liaisons and traditional cultural practitioners to ensure that current ceremonial activities conducted on the Peaks continue uninterrupted. The MOA provides that when the final

reclaimed water pipeline is field staked, the Forest Service will contact the tribes and offer to walk that area to ensure no special places are impacted.

203. The Forest Service also committed in the MOA to sharing with the tribes any authorized monitoring reports regarding water quality and the effects of additional moisture on plants, animals, and the terrain.

204. The MOA guaranteed that, to the extent practicable, the final locations of new ski runs will take advantage of previously-disturbed areas, such as where trees were already dead.

205. About 900 gallons per minute are needed to make a sufficient amount of snow for the Snowbowl upgrades.

206. Although the use of fresh water for snowmaking would not alleviate the tribes' religious concerns, several alternative water sources were considered. However, after logistics, economics, water availability, alternate distribution systems, etc., were studied, the use of potable water sources rather than reclaimed water was determined to be imprudent.

207. J.R. Murray, manager of the Arizona Snowbowl ski area sought advice from several local experts regarding possible sources of water for snowmaking and the availability and sustainability of such sources.

208. It would not be feasible to haul potable water up to the Snowbowl for snowmaking because it would not be possible to transport the necessary quantity of water up to the Snowbowl SUP area.

209. The City of Flagstaff was unwilling to provide potable water for snowmaking at the Snowbowl ski area due to their long-term concerns with water availability.

210. It would not be feasible to harvest water, i.e., to collect surface water off of an impermeable surface in order to make snow at the Snowbowl ski area because the volcanic rock on the Peaks has a high infiltration capacity.

211. Perched water-bearing zones are thin, discontinuous water systems that rely on seasonal recharge to be replenished. For example, the perched water-bearing zone in the Inner Basin is typically only a seasonal supply of water.

212. The perched water-bearing zone in the Inner Basin is a not a reliable source of water due to the nature of perched water-bearing zones, the City of Flagstaff's use of water from this area, and the fact that the availability of water in this area is entirely dependent upon snowmelt for recharge.

213. The perched water-bearing zones in the Hart Prairie area are typically even smaller than the perched water-bearing zones in the Inner Basin.[20] The capacity of the perched water-bearing zones in the Hart Prairie area are relatively small. Although it is not uncommon to drill a well into the perched water-bearing zone in the Hart Prairie area and not hit water, successful wells in the perched water-bearing zones in the Hart Prairie area yield just a few gallons to a few tens of gallons per minute of water. Therefore, it

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[20] The ski area's original base was established in Hart Prairie in 1938.

would be necessary to drill at least 100 wells into the perched water-bearing zone in the Hart Prairie area to obtain about 1000 gallons of water per minute.

214. The perched water-bearing zones in the Fort Valley area are small and discontinuous. It is common to drill a well into the perched water-bearing zone in the Fort Valley area and not hit water. The capacity of wells drilled into perched water-bearing zones in the Fort Valley area are typically a few gallons to no more than 10 or 20 gallons of water per minute.

215. Based upon current information, the C-Aquifer underlying the Peaks is only partly saturated, and the depth to water below land surface under the Peaks would be in the order of more than 3000 feet.

216. The cost of drilling a hole and placing casing in the hole for a well to the C-Aquifer would cost around $500,000 to $1 million. This amount does not include the cost of conducting hydrologic or geologic studies in advance of drilling the well, which would increase the likelihood of developing a successful well. It is possible to encounter difficulties in drilling to the C-Aquifer that could effectively cause the drilling program to fail. Although it is known that there is water in the R-Aquifer underlying the Peaks, at this time, it is not possible to estimate the capacity of the R-Aquifer in and around the Peaks.

217. Typically, the parts of the C-Aquifer that are unsaturated are substantially deeper.

218. The R-Aquifer is located as much as 1000 feet below the bottom of the C-Aquifer.

219. The cost of drilling a hole and placing casing in the hole for a well to the R-Aquifer around the Peaks would cost at least $3 million. This amount does not include the cost of other actions that it would be prudent to undertake prior to drilling such a well.

220. It is possible to encounter difficulties in drilling to the R-Aquifer that could effectively cause the drilling program to fail.

221. There is a risk that a well drilled to the R-Aquifer would not have sufficient yield, and the well would fail or collapse.

222. While the Court has enumerated findings of fact herein, these findings are not intended to be all inclusive or narrowly limiting. A great number of additional findings could be made in support of the Court's conclusions of law.

B. Conclusions of Law

1. Under RFRA, a law of general applicability that provides conduct that substantially burdens a person's exercise of religion is invalid unless the law is the least restrictive means of serving a compelling government interest. 42 U.S.C. § 2000bb-1(b). The statutorily imposed test must be interpreted with regard to the relevant circumstances in each case. *See Hamilton v. Schriro*, 74 F.3d 1545, 1553 (8th Cir. 1996).

2. To establish a *prima facie* case under RFRA, a plaintiff must show that the law substantially burdens his ability to freely exercise his religion. *Guam*, 290 F. 3d at 1222. Once a plaintiff has established a *prima facie* case, the burden shifts to the defendant to demonstrate that the law fur-

thers a "compelling interest" using the least restrictive means. *Id.*

3. The compelling interest test, which had been the standard for analyzing First Amendment free exercise claims, was rejected in *Employment Division v. Smith*, 494 U. S. 872 (1990). Congress enacted RFRA to restore pre-*Smith* law and the compelling interest test. 42 U. S.C. § 2000bb(b)(1).

4. RFRA provides no definition of "substantial burden." Rather, in enacting RFRA, Congress expected "that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. No. 103-111 at 8-9 (1993). Therefore, free exercise cases decided prior to *Smith* involving land management decisions – such as *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988) and *Wilson*, 708 F.2d at 735, *cert. denied*, sub nom. *Navajo Medicinemen's Ass'n v. Block*, 464 U.S. 1056 (1984) – are instructive here.

5. The Ninth Circuit has clearly articulated the proper legal standard to be applied in this case: an action "burdens the free exercise of religion if it puts substantial pressure on an adherent to modify his behavior and violate his beliefs, including when . . . it results in the choice of an individual of either abandoning his religious principle or facing criminal prosecution." *Guam*, 290 F.3d at 1222.

1. Substantial Burden

6. A RFRA plaintiff has the burden of showing that the government's action "burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates." *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000); *see Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1152 (E.D. Cal. 2003) ("To meet the 'substantial burden' standard, the governmental conduct being challenged must *actually inhibit* religious activity in a concrete way, and cause more than a mere inconvenience.") (emphasis in original).

7. The government's land management decision will not be a "substantial burden" absent a showing that it coerces someone into violating his or her religious beliefs or penalizes his or her religious activity. *Lyng*, 485 U. S. at 449-53 (the case law "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions"); *see Wilson*, 708 F.2d at 741 ("Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion."); *see also Havasupai Tribe*, 752 F. Supp. at 1484-1486 (finding Forest Service approval of plan for operations of uranium mine does not substantially burden exercise of

religion because, although Havasupai Tribe's religious and cultural belief systems are "intimately bound up" in the site, "Plaintiffs are not penalized for their beliefs, nor are they prevented from practicing their religion."); *Means*, 858 F.2d at 406-07 (finding no substantial burden where "[t]he Forest Service has performed no act of compulsion to interfere with appellees' ceremonies or practices nor has it denied them access to [the Forest lands] for religious purposes").

8. Indeed, "Courts consistently have refused to disturb governmental land management decisions that have been challenged by Native Americans on free exercise grounds." *Means*, 858 F.2d at 407 (providing citations to numerous cases).

9. The statutory duty imposed by RFRA is only fairly viewed in the context of other Congressional mandates, such as the National Forest Management Act's multiple-use mandate. *See* 16 U.S.C. § 1604(e).

10. The evaluation of when the government's land management decisions cross the line from legitimate conduct to unconstitutional prohibitions on the free exercise of religion "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng*, 485 U.S. at 451.

11. Allowing such a subjective definition of substantial burden would open the door to the imposition of "religious servitudes" over large portions of federal land. *Id.* at 452-53 (noting that while Plaintiffs "stress the limits of the religious servitude that they are now seeking" . . . "[n]othing in the principle for which they contend . . . would

distinguish this case from another lawsuit in which they . . . might seek to exclude all human activity but their own from sacred areas of the public lands.").

12. "RFRA on its own does not provide a freestanding right to free exercise of religion on another's property." *Benally v. Kaye*, Order, Civil No. 3:03 - CV-01330-PCT-NVW (D. Ariz. Sept. 7, 2005) (dismissing claim that Hopi Tribe law enforcement substantially burdened Navajos' exercise of religion by taking various actions to interfere with their Sundance ceremony).

13. Here, Plaintiffs have failed to demonstrate that the Snowbowl decision coerces them into violating their religious beliefs or penalizes their religious activity. *Cf. Lyng*, 485 U.S. at 449 182. In fact, the Forest Service has guaranteed that religious practitioners would still have access to the Snowbowl and the approximately 74,000 acres of the CNF that comprise the Peaks for religious purposes.

14. Plaintiffs have failed to present any objective evidence that their exercise of religion will be impacted by the Snowbowl upgrades. Plaintiffs have not identified any plants, springs or natural resources within the SUP area that would be affected by the Snowbowl upgrades. They have identified no shrines or religious ceremonies that would be impacted by the Snowbowl decision.

15. Plaintiffs' assertions of perceived religious impact are near identical to those voiced by the Hopi Tribe and the Navajo Nation in *Wilson v. Block*. In that case, the plaintiffs similarly asserted that "development of the Peaks would be a

profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes." 708 F.2d at 740. They contended "that development would seriously impair their ability to pray and conduct ceremonies upon the Peaks." *Id.* Considering this information, the D.C. Circuit found the agency's decision did not substantially burden the tribes' exercise of religion. *Id.* at 745. The same decision is warranted here. The subjective views and beliefs presented at trial, although sincerely held, are not sufficient for the proposed project to constitute a substantial burden under RFRA on the practice of religion by any Plaintiff or any members of any Plaintiff tribe or nation.

16. If the facts alleged by Plaintiffs were enough to establish a substantial burden, the Forest Service would be left in a precarious situation as it attempted to manage the millions of acres of public lands in Arizona, and elsewhere, that are considered sacred to Native American tribes.

17. As the D.C. Circuit found in *Wilson*:

> The Secretary of Agriculture has a statutory duty . . . to manage the National Forests in the public interest, and he has determined that the public interest would best be served by expansion of the Snow Bowl ski area. In making that determination, the Secretary has not directly or indirectly penalized the plaintiffs for their beliefs. The construction approved by the Secretary is, indeed, inconsistent with the plaintiffs' beliefs, and will cause the plaintiffs spiritual disquiet, but such consequences do not state a free exer-

cise claim under *Sherbert, Thomas*, or any other authority.

Id. at 741-42.

18. The Snowbowl decision does not bar Plaintiffs' access, use, or ritual practice on any part of the Peaks. The decision does not coerce individuals into acting contrary to their religious beliefs nor does it penalize anyone for practicing his or her religion.

19. Indeed, Defendants have committed, in the MOA, to ensuring that religious practitioners will have access to the 777-acre SUP area and the approximately 74,000 remaining acres of the Peaks for religious purposes.

20. Because Plaintiffs have not demonstrated a substantial burden to any exercise of religion, Plaintiffs have failed to establish a *prima facie* RFRA case.

2. Compelling Governmental Interest

21. When applying the compelling government interest standard, "[c]ontext matters." *Cutter v. Wilkinson*, 125 S.Ct. 2113, 2123 (2005), *citing Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (alterations in original). Thus, "accommodation must be measured so that it does not override other significant interests." *Id.*

22. The government has a compelling interest in selecting the alternative that best achieves its multiple-use mandate under the National Forest Management Act. The Forest Service here has a compelling interest in managing the public land for recreational uses such as skiing.

23. Congress has directed the Forest Service to manage the National Forests for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 1604(e). Providing the public opportunities for outdoor recreation on the public lands is thus integral to the Forest Service's mission in managing the National Forests.

24. Congress established a permitting system in order to facilitate the operation of ski areas and facilities on National Forest land. 16 U.S.C. § 497b; 36 C.F.R. § 251.53(n). Accordingly, many National Forests, including the CNF, have established designated recreation sites for skiing. The operation of the ski areas, through the special-use permit system, allows the Forest Service to provide the type of "outdoor recreation" mandated by NFMA.

25. The CNF Forest Service Plan, which underwent its own public review process, directs the Forest Service to manage the Snowbowl as a developed ski area.

26. The protection of public safety is also a compelling governmental interest. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Here, the Forest Service has a compelling interest in authorizing upgrades at Snowbowl to ensure that users of the National Forest ski area have a safe experience.

27. The Forest Service's compliance with the Establishment Clause is an additional compelling government interest. *See Seidman v. Paradise Valley Unified Sch. District No. 69*, 327 F. Supp. 2d 1098, 1112 (D. Ariz. 2004) ("compliance with Es-

tablishment Clause is a state interest sufficiently compelling to justify content based-restrictions on speech") (citing *Capitol Square Review & Advisory Bd v. Pinette*, 515 U.S. 753, 761-62 (1995)); *see also Widmar v. Vincent*, 454 U. S. 263, 271 (1981) (government's interest in complying with its constitutional obligations is compelling).

28. While Plaintiffs may find it offensive that lands that have cultural and religious significance to them also host recreational activities, this cannot justify a "religious servitude" over large amounts of public land. "The Supreme Court has held repeatedly that the First Amendment may not be asserted to deprive the public of its normal use of an area." *Inupiat Comty. of Arctic Slope v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982) (finding government's interest in pursuing mineral development on public lands outweighed alleged interference with religious beliefs); *Lyng*, 485 U.S. at 453 ("Whatever rights the Indians may have to the use of the area . . ., those rights do not divest the Government of *its* right to use what is, after all, its land."); *see also Means*, 858 F.2d at 408 n.7.

3. Least Restrictive Means

29. The Ninth Circuit has held that the government meets its burden of showing the least restrictive means if "it demonstrates that it actually considered and rejected the efficacy of less restrictive means before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also U.S. v. Antoine*, 318 F.3d 919, 923-24 (9th Cir. 2003), *cert. denied*, 540 U.S. 1221 (2004); *U.S. v. Hugs*, 109 F.3d 1375, 1378-79 (9th Cir. 1997) (government permit scheme

was the least restrictive means because it still permitted access to eagles and eagle parts for religious purposes, albeit not in as convenient a manner as the Indian defendants would have liked).

30. The Forest Service chose the least restrictive means for achieving its land management decision.

31. The Forest Service has determined that the Snowbowl facilities' improvements, including snowmaking, will enable the ski area to provide a safe, reliable and consistent operating season. Furthermore, the evidence adduced at trial demonstrates that snowmaking is needed to maintain the viability of the Snowbowl as a public recreational resource.

32. In carrying out its obligations under NEPA and NHPA, the Forest Service reached a decision that enables the purposes of the Snowbowl improvements to be carried out in a manner that is designed to minimize adverse impacts, including impacts to the tribes' culture and religion.

33. The Forest Service considered the use of fresh water, including ground water, and determined that it was not readily available. Likewise, the Forest Service considered reduced snowmaking (and therefore a lesser amount of reclaimed water used on the mountain), but determined that this was impracticable and would not address tribal concerns.

34. The Forest Service also considered an alternative that would not permit any snowmaking (Alternative 3) on the Peaks, and a No-Action Alternative, but determined that adopting such an ap-

proach would likely lead to the loss of the Snowbowl facility

35. Plaintiffs cannot "demonstrate what, if any, less restrictive means remain unexplored." *Hamilton*, 74 F.3d at 1555. The government is not required to "refute every conceivable option" to prove that its action is narrowly tailored. *Id.*

36. A reviewing court should not second-guess the reasonable determination of the responsible government official by means of a de novo assessment of whether there is some other, less intrusive means of achieving the government's objective. *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989) ("The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was 'the least intrusive means' of achieving the desired end.") and *id.* at 800. *Accord, Clark v. Cmty For Creative Non-Violence*, 468 U.S. 288, 299 (1984); *Carew-Reid v. Metro. Transp. Auth.*, 903 F.2d 914, 917 (2d Cir. 1990).

37. The Court finds as a matter of fact and concludes as a matter of law that the Forest Service's decision to authorize upgrades to an existing ski area on the CNF is not a violation of RFRA.

III. Conclusion

The Forest Service properly observed all of the procedural requirements during the various stages of approving the Snowbowl project, including preparation of an extensive EIS. The Court's role is to review compliance with these procedures, not to review the substance of the agency's decision. Therefore, Defendants' and Defendant-Intervenor's motions for sum-

mary judgment are granted, and Plaintiffs' motions for summary judgment are denied. As such,

IT IS ORDERED that the Defendants' Motion for Summary Judgment (Doc. 71) is GRANTED in part and DENIED in part. The motion is denied with respect to the Plaintiffs' RFRA claims only, and is granted with respect to all other counts.

IT IS FURTHER ORDERED that Arizona Snowbowl Resort's Motion for Summary Judgment (Doc. 68) is GRANTED in part and DENIED in part. The motion is denied with respect to the Plaintiffs' RFRA claims only, and is granted as to all other counts.

IT IS FURTHER ORDERED that the Navajo Plaintiffs' Motion for Summary Judgment (Doc. 73) is DENIED.

IT IS FURTHER ORDERED that the Hopi Plaintiffs' Motion for Summary Judgment (Doc. 65) is DENIED.

IT IS FURTHER ORDERED that the Hualapai Plaintiffs' Motion for Summary Judgment (Doc. 67) is DENIED.

IT IS FURTHER ORDERED that the Havasupai Plaintiffs' Motion for Summary Judgment (Doc. 70) is DENIED.

IT IS FURTHER ORDERED that the Plaintiffs' claims under RFRA are DISMISSED.

IT IS FURTHER ORDERED that the Navajo Plaintiffs' Motion to Amend/Correct Amended Complaint (Doc. 75) is DENIED.

IT IS FURTHER ORDERED that the Defendants' Motion for Leave to File Proposed Findings of Fact

and Conclusions of Law Beyond Deadline (Doc. 259) is GRANTED.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter judgment in favor of the Defendants and Defendant-Intervenor and against Plaintiffs on all counts.

DATED this 11th day of January, 2006.

APPENDIX D

UNITED STATES CODE ANNOTATED
Title 42. The Public Health and Welfare
Chapter 21B. Religious Freedom Restoration

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963)

and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting, under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

APPENDIX E

UNITED STATES CODE ANNOTATED
Title 42. The Public Health and Welfare
Chapter 21C. Protection of Religious Exercise in Land Use and by Institutionalized Persons

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person

residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden

of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a

substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses, in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance: or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

§ 2000cc-4. Establishment Clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

§ 2000cc-5. Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause" means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

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(5)

No. 08-846

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IN THE

Supreme Court of the United States

NAVAJO NATION, *et al.*,
Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held—in conformance with this Court's precedents—that a snowmaking plan that would "diminish the sacredness" of government land in the view of certain Indian tribes imposed no substantial burden on those tribes' religious exercise.

RULE 29.6 STATEMENT

Respondent the Arizona Snowbowl Resort Limited Partnership states that it has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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IN THE

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NAVAJO NATION, *et al.*,
Petitioners,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

INTRODUCTION

This case presents the question whether a federal government land-use decision that would "spiritually contaminate[ ]" a mountain and thus "injure[ ] [the] religious sensibilities" of certain Native American tribes amounts to a substantial burden on those tribes' religious exercise.[1] Pet. App. 5a-6a. This Court resolved that question, on indistinguishable facts, more than 20 years ago. *See Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442-

[1] For purposes of recusal, counsel for respondent states that Hogan & Hartson LLP began representing respondent in this matter on May 7, 2007.

444 (1988) (government land-use decision that would "seriously damage the salient * * * qualities" of land sacred to tribes, and thus cause severe adverse effects on tribes' "belief systems," did not constitute cognizable burden on religion). Faithfully applying *Lyng* and other of this Court's precedents to the facts of this case, the *en banc* Ninth Circuit held that the petitioner tribes' asserted harm to their belief systems could not constitute a substantial burden on their religious exercise in the absence of some governmental coercion or penalty. Pet. App. 7a, 20a. This Court should not invoke its certiorari power to review a decision that followed its teachings to the letter.

Petitioners make no attempt to distinguish this case from *Lyng*. Instead, they assert that *Lyng* is inapplicable because it arose under the First Amendment's Free Exercise Clause while this case arises under the Religious Freedom Restoration Act ("RFRA"). But that argument runs up against the fact—universally acknowledged in the courts of appeals—that Congress enacted RFRA precisely to revive the standards applied in this Court's pre-1990 Free Exercise jurisprudence, including *Lyng* and its progenitors. *See infra* at 13-14. The codification of a legal standard into a new statute does not give petitioners license to relitigate a case this Court has already decided.

Nor are the circuits divided as to the definition of "substantial burden." Petitioners attempt to manufacture a circuit split by quoting certain circuits' substantial burden formulations and noting that some of their words differ. But even a cursory analysis of those decisions makes clear that they are

reconcilable: All require governmental coercion of an adherent's religious conduct before a "substantial burden" may be found, and all articulate that requirement in similar ways. Those commonalities should not be surprising, given that all base their formulations on the same Supreme Court decisions that guided the analysis in *Lyng*. And in any event, "an inconsistency in dicta" does not a circuit split make; for a true conflict to exist, "there must be a real or 'intolerable' conflict on the same matter of law or fact." *See* R. Stern *et al.*, *Supreme Court Practice* 241 (9th ed. 2007) ("*Stern & Gressman*"). No such conflict exists here. The "semantic differences" among the circuits' dicta have not been outcome-determinative; they are merely "minor variations" that stem from the circuits' "reword[ing]" of this Court's holdings. *Washington* v. *Klem*, 497 F.3d 272, 279 (3d Cir. 2007).

The Ninth Circuit's decision does not conflict with—indeed, follows inevitably from—this Court's cases, and there is no circuit split. The factors warranting certiorari review are absent. The petition should be denied.

COUNTERSTATEMENT

1. The San Francisco Peaks, a group of four mountains in northern Arizona, are located on federal land within the Coconino National Forest. Pet. App. 187a-188a. The federal government has for decades managed the Peaks to facilitate a variety of economic and leisure activities on the mountains, including livestock grazing, timber harvesting, mining, and camping. *Id.* 216a-218a.

The Arizona Snowbowl ski resort ("Snowbowl") occupies approximately one percent of the Peaks' 74,000-acre expanse. *Id.* 216a. The Snowbowl sits on the Peaks' western flank and has been used as a ski area, under a Forest Service permit, since at least 1938. It is one of two major downhill ski facilities in Arizona, and it serves the growing population of Phoenix; as the District Court found, it is "an important public recreational resource." *Id.* 216a-218a. The Snowbowl also provides substantial economic benefits, including hundreds of jobs, to the local community. SER0700-02, 1471-73.

2. The Snowbowl has long been the subject of litigation by certain Native American tribes, who believe that the Peaks have "cultural and religious significance." Pet. App. 215a-216a. In 1979, for example, the Forest Service approved upgrades to the Snowbowl, including new trails and facilities. *Id.* 188a. Several tribes challenged the approval on Free Exercise grounds, arguing that "development of the Peaks would be a profane act, and an affront to the deities" and that "the Peaks would lose their healing power and otherwise cease to benefit the tribes." *Wilson* v. *Block*, 708 F.2d 735, 740 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983). The D.C. Circuit rejected the tribes' arguments, holding that the adverse effects the tribes described did not amount to a "substantial burden." The *Wilson* court accepted that the proposed upgrades to the Snowbowl would cause the tribes "spiritual disquiet" but explained that that did not suffice to trigger strict scrutiny: "Many government actions may offend religious believers * * *, but unless such actions penalize faith, they do not burden religion." *Id.* at 741-742.

The Snowbowl has been operating ever since under the plan approved in *Wilson*. Pet. App. 189a. And despite their representations in *Wilson* about the effect the Snowbowl upgrades would have on their religious practices, the tribes have continued to use the Peaks as before; as the District Court found, "[t]ribal beliefs, ceremonies, and practices have not changed." *Id.* 218a, 226a.

3. The Snowbowl has experienced "highly variable snowfall" over the last several years, including lengthy periods in recent winters when there was not enough snow to support skiing. *Id.* 218a; SER1879. The variable snowfall has caused extreme fluctuations in skier visits and annual revenues. Pet. App. 218a-219a. Without snowmaking to supplement the area's natural snowfall, the Snowbowl will go out of business. Pet. App. 250a, 264a-265a.[2]

In 2002, the Snowbowl sought the Forest Service's approval to begin snowmaking—a practice employed at most major downhill ski areas, including those in other national forests, to ensure consistent ski seasons. Pet. App. 219a; SER1494-95, 1461. Because there is insufficient available surface or groundwater in the Flagstaff region to support snowmaking, the Snowbowl sought approval to use

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[2] *Amici* the National Congress of American Indians (NCAI) *et al.* maintain that "the record in this case makes clear" that skiing on the Peaks "would continue without artificial snowmaking." NCAI Br. 23. This assertion is counterfactual. The District Court found that "snowmaking is needed to maintain the viability of the Snowbowl," and the Forest Service found that a no-snowmaking alternative "would likely lead to the loss of the Snowbowl facility." Pet. App. 264a-265a.

Class A+ recycled wastewater, or "reclaimed water." Pet. App. 189a.

Class A+ water is the highest grade of reclaimed water recognized under Arizona law. *Id.* 223a. It is cleansed and purified at a Flagstaff treatment facility that employs ultraviolet disinfection processes, chlorine, and other cleaning agents. The resulting water "must comply with extensive * * * monitoring requirements under three separate permit programs." *Id.* 224a. The Flagstaff facility's purification technology is so advanced that the City of Flagstaff uses the water on parks and school playgrounds, and Arizona regulations authorize Class A+ reclaimed water for "any type of direct reuse," including spraying on food crops and orchards. *E.g.*, SER1881, 1883; Ariz. Admin. Code § R18-11-303(D) & Tbl. A. Indeed, "[r]eclaimed water is used by many of the [petitioner] tribes" themselves—including for snowmaking on other land they consider sacred. Pet. App. 230a, 245a-246a.[3]

The petitioner tribes nonetheless disparagingly refer to reclaimed water as "sewage water," emphasizing that "Arizona regulations prohibit the use of recycled sewage water for human consumption" and certain "full-immersion water activity." Pet. 6-7 & n.2 (quotation marks and citation omitted). This high-rhetoric summary omits quite a few crucial facts, none more important than this one: The same regulation to which petitioners refer "specifically allows Class A+ reclaimed water—

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[3] Petitioner the White Mountain Apache Tribe, for instance, runs a ski resort on sacred land that "relies upon artificial snowmaking" using in part "reclaimed water." *Id.* 245a.

the class of water to be used at the Snowbowl—*for direct reuse in snowmaking*." Pet. App. 201a (emphasis added). Indeed, Class A+ reclaimed water is more thoroughly purified than Arizona law requires for this purpose. *See* Ariz. Admin. Code § R18-11-309 Tbl. A (specifying that reclaimed water of Class A and above may be used to make snow). The state's approval of high-grade reclaimed water for snowmaking and many other uses is unsurprising. The use of reclaimed water is a common, environmentally sound practice in Arizona and other Western states. SER0602, 1414, 1554a.

4. The Snowbowl's snowmaking proposal, which was included in a broader proposal to make other upgrades, received extensive review beginning in 2002. Even before it opened the proposal to full public comment, the Forest Service sought input from the tribes. Pet. App. 219a. All told, the Forest Service made more than 500 contacts with tribal members, held some fifty meetings with them, and considered more than 11,000 comments from tribes and other interested groups. *Id.* 219a-220a. The tribes, for their part, made clear that they objected on religious grounds not just to snowmaking with reclaimed water, but to snowmaking in general—and indeed to the Snowbowl's continued existence. The courts below found that the Havasupai petitioners consider snowmaking "profane"; that the Navajo petitioners' "official position is that the Snowbowl should be shut down completely"; and that the Hopis, White Mountain Apache, and Navajos "would oppose snowmaking at the Snowbowl even if the snow was made from fresh water." *Id.* 5a, 230a, 234a, 249a.

After reviewing these and other objections and considering at least a dozen alternative plans (including fresh-water snowmaking, no snowmaking, and closing the Snowbowl altogether), the Forest Service approved the reclaimed-water snowmaking plan in February 2005. *Id.* 220a-221a.

5. Petitioners filed suit in the District of Arizona. *Id.* 186a. The suit alleged that the Forest Service's approval of the Snowbowl project violated RFRA, other federal statutes, and the government's Indian trust responsibilities. *Id.* 190a-191a. The District Court rejected six of petitioners' seven claims on summary judgment. *Id.* 191a-214a. As to RFRA, however, the court decided that the issues were fact-intensive and set the matter for trial. *Id.* 215a.

After an eleven-day bench trial on the RFRA substantial-burden question, the court issued 222 findings of fact, *id.* 215a-255a, and entered judgment for the Forest Service and the Snowbowl. The court noted that while "RFRA provides no definition of 'substantial burden,'" Congress enacted RFRA with the expectation "'that the courts will look to free exercise cases decided prior to [*Employment Division* v. *Smith*, 494 U.S. 872 (1990)] for guidance in determining whether the exercise of religion has been substantially burdened.'" *Id.* 256a (quoting S. Rep. No. 103-111 at 8-9 (1993)). These cases include *Lyng*. *Id.* After reviewing *Lyng* and the cases on which it relied, the court concluded that a government action "will not be a 'substantial burden' absent a showing that it coerces someone into violating his or her religious beliefs or penalizes his or her religious activity." *Id.* 257a.

The District Court found that the petitioners had "failed to demonstrate" that the Forest Service's snowmaking approval constituted any such coercion or penalty. *Id.* 259a. It found that the tribes would still have access to all of the Snowbowl for religious purposes; that the project "does not bar Plaintiffs' access, use, or ritual practice on any part of the Peaks"; and that the Forest Service's decision "does not coerce individuals into acting contrary to their religious beliefs [or] penalize anyone for practicing his or her religion." *Id.* 259a-261a.

The District Court observed that the tribes had asserted—in "near identical" terms to those used by their predecessors in *Wilson*—that "development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would * * * cease to benefit the tribes." *Id.* 259a-260a (internal quotation omitted). But the court explained that these beliefs, "although sincerely held, are not sufficient for the proposed project to constitute a substantial burden under RFRA" absent a coercive effect on religious practices. *Id.* 260a-261a. The court also concluded in the alternative that the government had a compelling interest and had chosen the least restrictive means to accomplish its goals. *Id.* 261a-265a.

6. A Ninth Circuit panel reversed in part, finding that the artificial snowmaking plan violated RFRA and the National Environmental Policy Act. *Id.* 118a. Writing for the panel, Judge William Fletcher opined that *Lyng* was inapposite because "RFRA provides greater protection for religious practices than did the Supreme Court's pre-*Smith* free exercise cases." *Id.* 125a. This was so, according to

Judge Fletcher, in part because "RFRA goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden.'" *Id.* (quotation marks and citation omitted). The panel concluded that the snowmaking plan imposed such a "burden" because it would "undermine" the tribes' belief systems. *Id.* 147a. The panel applied strict scrutiny and concluded (also contrary to the District Court) that the Snowbowl upgrade plan was not justified by a compelling governmental interest. *Id.* 154a.

The Forest Service and the Snowbowl sought rehearing, observing, among other things, that the panel's decision was in deep tension with *Lyng*. The Ninth Circuit agreed to rehear the case *en banc* and, by an 8-3 vote, reinstated the District Court's decision. Writing for the majority, Judge Bea explained that "a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden'—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the exercise of religion." Pet. App. 7a. On the contrary, under RFRA a burden is only cognizable if government coercion exists: "Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no 'substantial burden' on the exercise of religion." *Id.*

The *en banc* court explained that "Congress expressly instructed the courts to look to pre-*Smith*

Free Exercise Clause cases * * * to interpret RFRA," and therefore that "the cases that RFRA expressly adopted and restored * * * control the 'substantial burden' inquiry." Pet. App. 23a n.13, 18a (citing 42 U.S.C. § 2000bb(a)(5)). Reviewing those cases—including *Sherbert* v. *Verner*, 374 U.S. 398 (1963), *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Thomas* v. *Review Board of Indiana*, 450 U.S. 707 (1981)—the majority concluded that this Court has always required governmental coercion or penalty before it has found a "substantial burden" on religious exercise. *Id.* 19a-25a. *Lyng*, in particular, was "on point." *Id.* 22a. The majority observed that *Lyng* had rejected an indistinguishable burden argument by Indian tribes, precisely on the ground that no matter how serious the government project's effect might be on sacred land, the tribes were neither " 'coerced by the Government's action into violating their religious beliefs' " nor " 'penalize[d]' " for their "religious activity.' " *Id.* 23a-24a (quoting *Lyng*, 485 U.S. at 449). The *en banc* majority concluded:

> Like the Indians in *Lyng*, the Plaintiffs here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment. Even were we to assume, as did the Supreme Court in *Lyng*, that the government action in this case will "virtually destroy the * * * Indians' ability to practice their religion," there is nothing to distinguish the road-building project in *Lyng* from the use of recycled wastewater on the Peaks. [*Id.* 25a (quoting *Lyng*, 485 U.S. at 451)].

Judge Fletcher, the author of the panel opinion, dissented, joined by Judges Pregerson and Fisher. The dissent maintained that the majority's definition of "substantial burden" was more restrictive than pre-*Smith* case law warranted. *Id.* 58a-59a. The majority rejected this argument, observing that "the dissent cannot point to a single Supreme Court case where the Court found a substantial burden * * * outside the [coercion/penalty] framework. The reason is simple: There is none." *Id.* 31a. The dissent also suggested that the majority's definition of "substantial burden" was inconsistent with the dictionary definition of that term. *Id.* 55a. The majority rejected this argument too, explaining that in RFRA "Congress expressly * * * restored a body of Supreme Court case law that defines what constitutes a substantial burden on the exercise of religion. * * * Thus, we must look to those cases in interpreting the meaning of 'substantial burden.'" *Id.* 29a-30a (citing 42 U.S.C. §§ 2000bb(a)(4)-(5); 2000bb(b)(1)).

The petitioners have sought certiorari. Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS A STRAIGHTFORWARD APPLICATION OF THIS COURT'S SETTLED PRECEDENTS.

1. This Court's Free Exercise cases, including *Lyng*, squarely foreclose petitioners' claim. In *Lyng*, Native American tribes argued that a government land-use project burdened their religious exercise because the project impaired the sanctity of the land, making it difficult, if not impossible, for them to

practice their religion. 485 U.S. at 451. The Court rejected this claim, holding that such adverse effects did not constitute a burden on religious exercise "heavy enough" to trigger strict scrutiny. *Id.* at 447. The burden was not cognizable, according to the Court, because the project did not "coerce[ ] [the tribes] into violating their religious beliefs; nor would [it] penalize religious activity." *Id.* at 449. The Court explained that its cases "do[ ] not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to *coerce* individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-451 (emphasis added). Just so here.

2. To be sure, this case involves RFRA, while *Lyng* dealt with the Free Exercise Clause. But as every circuit to consider the question has agreed, Congress enacted RFRA to codify this Court's pre-1990 Free Exercise jurisprudence, including *Lyng*.

a. RFRA was enacted in response to this Court's decision in *Smith*, which held that neutral, generally applicable laws are not subject to strict scrutiny even if they burden religion. *See Smith*, 494 U.S. at 878-879. Congress announced in RFRA that "the compelling interest test *as set forth in prior Federal court rulings* is a workable test for striking sensible balances" between religion and government. 42 U.S.C. §§ 2000bb(a)(4), (a)(5) (emphasis added). Indeed, the statute's stated purpose is "to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin*

v. *Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1).

The federal courts have concluded, apparently without exception, that Congress intended courts to look to pre-*Smith* Free Exercise case law in construing the term "substantial burden." *See, e.g.*, Pet. App. 23a n.13 (Ninth Circuit *en banc*, holding that "Congress expressly instructed the courts" on this point); *Village of Bensenville* v. *FAA*, 457 F.3d 52, 62 (D.C. Cir. 2006) ("RFRA was not meant to 'expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*.' ") (quoting S. Rep. No. 103-111, at 12); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996), *vacated on other grounds sub. nom. Christians* v. *Crystal Evangelical Free Church*, 521 U.S. 1114 (1997) (explaining as part of a substantial-burden analysis that RFRA's purpose was to "restore pre-*Smith* free exercise case law").[4] That pre-*Smith* case law, dating to 1963 and culminating in *Lyng*, forecloses petitioners' claim.

b. The relevant authority begins with *Sherbert*, where this Court held that the Free Exercise Clause barred a state from denying unemployment benefits to a claimant who refused a job that required her, in violation of her religious beliefs, to work on

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[4] *Accord Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 662 (10th Cir. 2006) (*Lyng*'s substantial burden definition is "controlling" for RFRA purposes); *Adams* v. *Comm'r*, 170 F.3d 173, 176 (3d Cir. 1999); *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995).

Saturday. The Court explained: "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert*, 374 U.S. at 406. Nine years later, in *Yoder*, the Court struck down a law that required Amish parents to send their children to school in violation of their religion. The Court concluded that the law "unduly burden[ed]" the parents' religious exercise because it "affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds" with their beliefs. 406 U.S. at 218, 220.

The Court subsequently elaborated on *Sherbert* and *Yoder*. In *Thomas*, the Court explained that *Sherbert* and its progeny targeted governmental regulations or actions with a "coercive impact" on religious exercise. *Thomas*, 450 U.S. at 717. The Court held: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 717-718. And in *Bowen* v. *Roy*, 476 U.S. 693 (1986), the Court relied on *Sherbert* to reject the claim that the government could not assign a Social Security number to a Native American girl because to do so would violate her father's beliefs. The *Bowen* Court explained that the father's objection was not that the government action "places any restriction on what he may believe or what he may do," but instead that "he believes the

use of the number may harm his daughter's spirit." 476 U.S. at 699. The Court flatly rejected the viability of such a claim: "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 699-700.

All of these cases led to the Court's holding in *Lyng*. *Lyng* addressed tribal challenges to a government road-building plan in a national forest. 485 U.S. at 442. The record revealed that the area around the road site was an "indispensable part of Indian religious conceptualization and practice," that "[s]pecific sites [we]re used for certain rituals," and that "successful use of the [area] is dependent upon * * * an undisturbed natural setting." *Id.* (citations omitted). The tribes had alleged, and the courts below had found, that construction of the road would "virtually destroy the * * * Indians' ability to practice their religion." *Id.* at 451.

Accepting that allegation as true, this Court nevertheless rejected the notion that the tribes' religious exercise had been burdened in any relevant way. *Id.* at 447. The Court explained that "[t]he building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*." *Id.* at 449. "In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," the Court observed. "In neither case, however, would the affected individuals be coerced by the Government's action into violating their

religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.*

The *Lyng* Court distinguished the type of claim the tribes were making from the claims made by the successful petitioners in *Sherbert* and *Yoder*. Those cases, the Court explained, involved "coercion or penalties on the free exercise of religion" that were no less coercive just because they were "indirect." *Id.* at 450. The tribes' claim, by contrast, involved "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* Such incidental effects are not the sorts of burdens that "require government to bring forward a compelling justification for its otherwise lawful actions." *Id.*

3. There is no daylight between *Lyng* and this case. The tribes here, like those in *Lyng*, submitted evidence that the Peaks are "of central importance" to their religions, that they collect items from the Peaks for rituals, and that the snowmaking project would have a "large negative impact" on the "focus" required for ceremonies. Pet. App. 237a, 234a, 229a; *compare Lyng*, 485 U.S. at 442, 451 (government property in question was an "indispensable part of Indian religious conceptualization and practice," "[s]pecific sites [we]re used for certain rituals," and the proposed government land-use project could "virtually destroy" the tribes' ability to practice their religion). But as the District Court found, the snowmaking project would have no coercive effect on

the tribes' religious conduct. Pet. App. 259a-261a. In the words of *Bowen*, the Snowbowl project would not "place[ ] any restriction on what [the tribes] may believe or what [they] may do." 476 U.S. at 699. In the absence of such a restriction, there is no "substantial burden" under this Court's teachings.

4. Petitioners resist the conclusion that *Lyng* and its predecessors control this case, but their arguments are meritless. First, they assert that the Ninth Circuit erred by reading RFRA's "substantial burden" verbiage against the backdrop of the Free Exercise jurisprudence discussed above; the better course, according to petitioners, would have been to ignore that jurisprudence and consult a dictionary. Pet. 24-26. But every circuit to have addressed the question has concluded that the term "substantial burden" in RFRA should be construed in light of this Court's pre-1990 cases. *See supra* at 14.[5]

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[5] Petitioners' contention on this point also contradicts other portions of their argument. They and their *amici* say RFRA "uses the 'same' substantial burden standard" as the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Pet. 14 (citation omitted); *see also* Friends Committee Br. 7. But there is no question that RLUIPA's substantial burden standard is drawn from pre-*Smith* jurisprudence. *See, e.g.*, *Klem*, 497 F.3d at 278 (concluding that Congress did not intend in RLUIPA "to create a new standard for the definition of 'substantial burden'" but instead intended that the term "should be interpreted by reference to Supreme Court jurisprudence") (quoting 146 Cong. Rec. S7774, 7776 (July 27, 2000) (quotation marks omitted); *id.* (observing that, in line with this congressional directive, "several courts of appeals have looked to [the pre-*Smith* cases] to interpret what the phrase [substantial burden] means for RLUIPA purposes").

Petitioners also contend that the Ninth Circuit erred by construing "substantial burden" to mean "the types of burdens imposed in *Sherbert* and *Yoder*"—namely, coercion or penalty. Pet. 25-26. But it was *this Court*, long before the Ninth Circuit, that repeatedly explained that coercion and penalty (or "compulsion" and "restriction," in the words of *Bowen*) are the hallmarks of a cognizable burden on religious exercise. *See Bowen*, 476 U.S. at 699-700; *Lyng*, 485 U.S. at 449; *Thomas*, 450 U.S. at 717-718. The Ninth Circuit can hardly be taken to task for following that explicit guidance.

Petitioners next argue that not all of the pre-*Smith* cases used the term "substantial burden"—some only used the word "burden"—and therefore they must not provide content to the former term under RFRA. Pet. 26. Again, this argument runs into a wall of unanimous circuit precedent, all construing RFRA's "substantial burden" standard in light of the panoply of pre-*Smith* cases. *See supra at* 13-14. It likewise ignores the fact that in the years before RFRA was enacted, this Court described the cases discussed above as "substantial burden" cases. *See Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989) (using the phrase "substantial burden" and citing *Thomas* and *Yoder*). *See also Ford* v. *McGinnis*, 352 F.3d 582, 591 (2d Cir. 2003) ("The notion that a plaintiff must establish a substantial burden on his religious exercise to claim constitutional protection is derived from * * * *Sherbert* v. *Verner*.").

Petitioners also place great emphasis on the notion that this Court in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), "recognized that Congress intended RFRA to apply" to autopsies of religious believers,

zoning regulations, and other government "actions [that] do not force anyone to act in a certain way." Pet. 25; *see also* Pet. 2-3. *City of Boerne* "recognized" no such thing. The cited passage recounts Congressional testimony from non-legislators; its import is to point out that "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *City of Boerne*, 521 U.S. at 530. Petitioners' invocation of this passage out of context, and their suggestion that this Court "recognized" RFRA's application in such circumstances, attributes to this Court a finding it did not make.

Petitioners, in short, are faced with (i) adverse and squarely applicable Supreme Court precedent on the meaning of "substantial burden," and (ii) unanimity among the circuits that that precedent informs the meaning of "substantial burden" under RFRA. There is nothing for this Court to decide.

II. THE CIRCUITS ARE NOT DIVIDED ON THE DEFINITION OF "SUBSTANTIAL BURDEN."

According to petitioners, however, there are circuit splits *everywhere* on this issue: Petitioners posit an "entrenched" circuit split on the meaning of "substantial burden," with the "deeply fractured" circuits "split broadly into three groups, [and] variations existing even within these categories." Pet. 12. In petitioners' view, just about every federal court of appeals has arrived at its own unique "substantial burden" test.

The very expansiveness of this claim underscores its flaws. For what petitioners see as multiple

"circuit splits" are in fact mere differences in wording among the circuits—every one of which defines "substantial burden" with reference to *Sherbert*, *Thomas*, and their progeny. *See infra* at 22-29; *see also Klem*, 497 F.3d at 279 (courts "have adopted some form of the *Sherbert/Thomas* formulation, but have often reworded their holdings"). The courts of appeals themselves recognize as much, with at least two expressing doubt that the semantic differences "come to [any]thing in practice." *Mack* v. *O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996), *vacated on other grounds sub. nom. O'Leary* v. *Mack*, 522 U.S. 801 (1997) (remanding in light of *City of Boerne*); *Klem*, 497 F.3d at 279.

Quite right. As an initial matter, the dicta are not even inconsistent: While petitioners recite each circuit's formulation and observe that the words differ, every circuit finds a "substantial burden" only when government coerces a believer to engage in or forgo religious exercise. That is the test the Supreme Court has articulated for 45 years, and it is the test the Ninth Circuit employed in this case.

The congruence among the circuits is on full display when one reviews the cases' actual holdings—something petitioners largely refrain from doing. An examination of dozens of decisions from the other circuits, including every case cited by petitioners, reveals that not one has found a substantial burden absent coercion or penalty (which after all is just a form of coercion) of an adherent's conduct. *See infra* at 29-31. That was the line the Court drew in *Sherbert*, *Yoder*, *Thomas*, *Bowen*, and *Lyng*, and it is a line that has held ever since. The circuit split petitioners hypothesize does not exist.

A. The Circuits' "Substantial Burden" Formulations Are Easily Reconciled.

1. The Ninth Circuit below held that a substantial burden is imposed only when "government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs." Pet. App. 7a. The formulations adopted by the Fourth and D.C. Circuits are almost verbatim, as petitioners concede (at Pet. 13). *See Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 172-173 (4th Cir. 1995); *Henderson* v. *Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). All three of these circuits' tests draw heavily on this Court's decision in *Thomas*, which explained that "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and violate his beliefs, a burden upon religion exists." 450 U.S. at 717-718. *See* Pet. App. 19a (quoting the above passage from *Thomas*); *Goodall*, 60 F.3d at 172 (same); *Henderson*, 253 F.3d at 16 (citing *Goodall* for the same proposition). And none can be met absent a governmental attempt to coerce an adherent's actions. *See* Pet. App. 20a (requiring that adherents be "forced to choose" between religious conduct and a governmental benefit or "coerced to act"); *Goodall*, 60 F.3d at 172-173 (requiring that adherents be "compelled to engage in conduct" or "forced to abstain from * * * action"); *Henderson*, 253 F.3d at 16 (requiring that adherents be forced "to engage in conduct" or prevented "from engaging in conduct").

Under none of these tests could petitioners—whose religious expression and acts are not coerced in any way by the decision to make artificial snow at the Snowbowl, *see* Pet. App. 259a-260a—show a substantial burden on their religious exercise.

2. Petitioners maintain that the Fifth, Third, and Eleventh Circuits "have adopted an[ ] intermediate approach" different from those described above. Pet. 17. But all three circuits' tests line up with the Ninth Circuit's formulation—and under none of them could petitioners state a claim.

In *Adkins* v. *Kaspar*, 393 F.3d 559 (5th Cir. 2004), the Fifth Circuit case cited by petitioners, the court reviewed *Sherbert*, *Thomas*, and *Lyng* to determine the contours of the "substantial burden" test. *Id.* at 569-570. The court held:

> [G]overnment action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. [*Id.* at 570 (citing *Sherbert* and *Thomas*)].

Petitioners quote the first sentence from *Adkins* above, Pet. 17, but they omit the second—a sentence nearly identical to the Ninth Circuit's test (*compare*

Pet. App. 20a) and drawn from the same Supreme Court cases. And while petitioners suggest that the "truly pressures the adherent" language of *Adkins* is at odds with the Ninth Circuit's test, *see* Pet. 17-18, that is incorrect. The "truly pressures" language comes straight from *Thomas*, which explained that government "pressures" adherents *precisely by coercing or penalizing their religious actions. See supra* at 15 (quoting *Thomas*, 450 U.S. at 717-718). The Fifth Circuit's "substantial burden" test, in short, has substantially similar language, and the same provenance, as the Ninth's.

The same analysis applies to the Third and Eleventh Circuits. In *Klem*, the Third Circuit held that "the Fifth Circuit in *Adkins* enunciated the proper standard for what constitutes a substantial burden." 497 F.3d at 280 n.7. The *Klem* court articulated that standard as follows: "[A] substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits * * * versus abandoning one of the precepts of his religion in order to receive a benefit; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Id.* at 280. This formulation—like all of those discussed above—is drawn from *Sherbert* and *Thomas* and cannot be met without governmental coercion ("substantial pressure" to violate beliefs; "forced" to forfeit a benefit) of an adherent's actions.

Likewise, the Eleventh Circuit has defined substantial burden as "significant pressure which directly *coerces* the religious adherent to conform his or her behavior" and has said it "can result from

pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (emphasis added). This formulation, too, is drawn in large part from *Thomas* and its progeny, *see id.* at 1226-27, and cannot be met absent governmental coercion.[6]

3. Petitioners assert that the Eighth and Tenth Circuits "have adopted a much broader conception of 'substantial burden' " than the Ninth Circuit, Pet. 13, but they make no attempt to explain why those circuits' language is "much broader." In fact it is not.

As petitioners note, Pet. 14, the Eighth and Tenth Circuits' formulations originate with *Werner* v. *McCotter*, 49 F.3d 1476 (10th Cir. 1995). The *Werner* plaintiff, a prisoner, argued that the state had restrained his religious conduct in three ways: It had denied him access to a sweat lodge, had prohibited him from possessing a medicine bag, and had refused to allow him access to a spiritual adviser or to religious literature. 49 F.3d at 1478. The court surveyed Supreme Court case law—including *Thomas* and *Yoder*—as well as other prisoner-rights cases, and held:

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[6] Petitioners argue that "the Eleventh Circuit believes that this Court's pre-*Smith* decisions do not offer definitive guidance on the subject [of substantial burden] because '[t]he Court's articulation of what constitutes a substantial burden has varied over time.' " Pet. 19 (quoting *Midrash*, 366 F.3d at 1226). The Eleventh Circuit "believes" no such thing. *Midrash* stated that "[t]he Supreme Court's definition of 'substantial burden' within its free exercise cases is instructive" in defining "substantial burden," and it then quoted *Thomas*, *Sherbert*, *Bowen*, and *Lyng*. *Midrash*, 366 F.3d at 1226-27.

> *Constraints upon religious conduct* will not fall within [RFRA] unless a "substantial burden" is placed upon a prisoner's capacity to exercise or express his or her sincerely held beliefs or faith. To exceed the "substantial burden" threshold, government regulation must significantly *inhibit or constrain conduct or expression* * * *, must meaningfully *curtail* a prisoner's ability to express adherence to his or her faith; or must *deny* a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion. [*Werner*, 49 F.3d at 1480 (emphases added; citations omitted)].

This formulation is consistent with those discussed above. Once again, the court's focus is on governmental attempts to coerce adherents to forgo religious actions: The government must "constrain" or "deny" an adherent's "conduct" or "activities" or "expression," else no cognizable burden is present. And while the *Werner* court spoke in terms of constraint and denial rather than coercion or penalty, that is hardly surprising. The context was a prisoner case. The government need not penalize prisoners for engaging in religious conduct when it can simply prohibit that conduct altogether. A flat-out ban is coercion writ large—and of course any attempt by a prisoner to resist such a ban no doubt would result in a coercive penalty.[7]

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[7] This point answers *amici*'s concerns regarding prisoners' rights. *See, e.g.* Friends Committee Br. 12. The Ninth Circuit's test, fairly read, allows for a "substantial burden" finding when prison officials bar prisoners from engaging in protected religious conduct.

That the *Werner* test does not differ from the decision below in any material way is confirmed by three observations about post-*Werner* case law. First, the Tenth Circuit twice has stated that *Lyng* is "controlling" as to "the definition of substantial burden." *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 661-662 (10th Cir. 2006); *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). Second, recent case law from these circuits has quoted *Werner* alongside the coercion/penalty formulation, again suggesting the courts see no material difference between the two. *See, e.g.*, *Gladson* v. *Iowa Dep't of Corr.*, 551 F.3d 825, 832 (8th Cir. 2009) (quoting *Werner* standard, immediately followed by *Thomas*).

Finally, and most importantly, the *Werner* formulation has never produced, in either the Eighth or Tenth Circuit, a "substantial burden" decision that would have come out differently in the Ninth Circuit—the hallmark of a circuit split. *See Stern & Gressman* at 242 ("genuine conflict" arises when "two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts."). In the 14 years since *Werner*, those circuits four times have found a substantial burden on religious exercise. *See Murphy* v. *Missouri Dep't of Corr.*, 372 F.3d 979 (8th Cir. 2004); *Kikumura* v. *Hurley*, 242 F.3d 950 (10th Cir. 2001); *Malik* v. *Kindt*, 107 F.3d 21 (10th Cir. 1997) (table disposition); *In re Young*, 82 F.3d 1407. All four cases involved the actual governmental prevention of religious conduct—worship in *Malik* and *Murphy*, pastoral visits in *Kikumura*, and tithing in *In re Young*. Neither circuit has found a "substantial burden" in a situation, like that presented here,

where the government did not coerce an adherent to forgo religious conduct.

Petitioners make only a cursory attempt to differentiate the *Werner* test from other circuits: They note that in adopting *Werner* for Eighth Circuit use, the *In re Young* court deemed it not "relevant" that the religious practice at issue "can continue"—a statement petitioners say is at odds with the Ninth Circuit's holding. Pet. 14 (quoting *In re Young*, 82 F.3d at 1418 and citing Pet. App. 6a & 20a); *see also* Br. of *Amici Curiae* Religious Liberty Law Scholars 8. This argument is quite mistaken. The cited passage from *In re Young* merely observed that a governmental constraint on religious conduct—forbidding debtors from tithing to their church—was no less of a "substantial burden" just because on some future date the government might lift the constraint and permit the debtors to resume tithing. *See* 82 F.3d at 1418. That conclusion is in perfect harmony with the Ninth Circuit's decision, which found no substantial burden because government placed no constraint on religious conduct in the first place. *See* Pet. App. 20a-21a.

4. Finally, as for the Seventh Circuit, petitioners rely on *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"), but they yet again make little attempt[8] to explain why

[8] Petitioners contend that the *CLUB* decision "asserted * * * that the Eighth and Tenth Circuits' construction of 'substantial burden' 'cannot be correct.'" Pet. 16 (quoting *CLUB*, 342 F.3d at 761). But the Seventh Circuit was not referring to RFRA at all; it was explaining that the Eighth and Tenth Circuits' test "cannot be correct" *for purposes of RLUIPA*, which the *CLUB* court thought necessitated a different "substantial burden" test than RFRA. *See CLUB*, 342 F.3d at 761.

they think the case's substantial burden formulation—that a regulation must "bear[ ] direct * * * responsibility for rendering religious exercise * * * effectively impracticable," 342 F.3d at 761—is at odds with the Ninth Circuit's formulation below. *See* Pet. 16. Indeed, petitioners admit that the "precise bounds" of the *CLUB* test "are unclear." Pet. 16 n.6. And the Seventh Circuit itself has said (i) that *CLUB*'s "effectively impracticable" verbiage should be defined with reference to *Thomas*' "pressure" test, *see Koger* v. *Bryan*, 523 F.3d 789, 799 (7th Cir. 2008), and (ii) that the *CLUB* test is "similar[ ]" to *Thomas*' formulation. *Vision Church* v. *Village of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006). *Thomas*, of course, provides the basis for the "substantial burden" formulations of most every circuit. *See supra* at 22-28; *see also Lovelace* v. *Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (stating that *CLUB*, *Adkins*, and *Midrash* all "[f]ollow[ ] th[e] model" provided in *Thomas* and are all "generally consistent" with one another). Given the Seventh Circuit's understanding of its own test, petitioners can hardly claim that *CLUB* and the decision below are at odds.

B. Courts Do Not Find A "Substantial Burden" Absent Coercion.

1. For all of the above reasons, petitioners have failed to demonstrate that the "minor variations" in the circuits' substantial burden frameworks, *Klem*, 497 F.3d at 279, render them inconsistent. Much less can petitioners demonstrate that these minor variations are outcome-determinative. We have already addressed this point with respect to the Eighth and Tenth Circuits, *see supra* at 27-28, and

the point holds with respect to every other circuit court whose precedent petitioners claim "conflicts" with the Ninth Circuit's governing rule: No case that we are aware of in *any* of those circuits has found a "substantial burden" absent governmental coercion of an adherent's religious conduct.

Take, for a starter set, the cases on which petitioners rely. The courts in *Goodall* (4th Cir.), *Adkins* (5th Cir.), *CLUB* (7th Cir.), *Henderson* (D.C. Cir.), *Weir* v. *Nix*, 114 F.3d 817 (8th Cir. 1997) (cited at Pet. 14), *Patel* v. *U.S. Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008) (cited at Pet. 15), and *Midrash* (11th Cir.) did not find substantial burdens on religious exercise. And the cases cited in the petition where the courts *did* find a substantial burden all involved governmental coercion that forced an adherent to forgo religious conduct. *See Klem*, 497 F.3d at 281-282 (government forbade plaintiff to read religious texts); *Werner*, 49 F.3d at 1478-79 (government forbade plaintiff access to a sweat lodge and a medicine bag); *In re Young*, 82 F.3d at 1418 (government blocked plaintiffs from tithing); *Longoria* v. *Dretke*, 507 F.3d 898, 903 (5th Cir. 2007) (cited at Pet. 17) (government forbade adherent from growing his hair); *Murphy*, 372 F.3d at 988 (government forbade adherent from worshipping with like-minded believers).

The same is true of other cases not cited by petitioners. We have found no decision from any of the Ninth Circuit's sister courts that finds a "substantial burden" under RFRA absent the sorts of governmental coercion of religious conduct discussed above. *See, e.g.*, *Diaz* v. *Collins*, 114 F.3d 69, 73 (5th Cir. 1997) (substantial burden where prisoner was

forbidden to grow his hair long, as required by his religion); *Jolly* v. *Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (substantial burden where prisoner was confined to his cell for refusing a medical test that violated his religious beliefs).

2. Unable to point to an appellate case that actually finds a substantial burden on facts anything like those presented here, petitioners are left to rely on an unpublished, mooted district court decision for the proposition that they could succeed under some court's "substantial burden" formulation. Pet. 15-16 (citing *Comanche Nation* v. *United States*, N. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008)). It is not at all clear even that *that* case supports their argument;[9] but the fact that it is the lone case to which they point speaks volumes about whether they have identified a "genuine conflict" among the circuits. *Stern & Gressman* at 242.

Petitioners' only other attempt to show that their "split" has led to divergent outcomes is by way of *ipse dixit*: They assert that they "would prevail" in the Eighth and Tenth Circuits and "might also prevail" in the Seventh, Third, Fifth, and "possibly even Eleventh" Circuits. Pet. 20-21. The short answer is that fifteen years of reported cases say otherwise.[10]

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[9] *Comanche Nation* involved tribe members' allegations that a governmental action would physically deny them access to a sacred site necessary for their religious exercise. *See* 2008 WL 4426621, at *3, *7, *17. The District Court here, in contrast, found that the petitioner tribes were not denied access to any sacred sites—or for that matter to any land on which the Snowbowl sits. *See* Pet App. 14a, 259a-261a.

[10] *Amici* law professors speculate that the Ninth Circuit's "substantial burden" formulation might lead to unwelcome

III. PETITIONERS' RULE WOULD HAVE SEVERE REPERCUSSIONS FOR FEDERAL PROGRAM MANAGEMENT.

Petitioners argue that their so-called circuit split "is bound to cause operational difficulties within federal agencies." Pet. 23. Not so. Quite the opposite, in fact; courts—including this Court—uniformly have recognized that it is *petitioners'* proposed rule of decision that would wreak havoc on federal program management. As the Ninth Circuit majority explained, petitioners' preferred rule would leave "any action the federal government were to take, including action on its own land, * * * subject to the personalized oversight of millions of citizens," with each holding "an individual veto to prohibit the government action"—or at least force it to meet strict scrutiny—"solely because it offends his religious beliefs." Pet. App. 7a. Petitioners' rule, in short, would impose a "religious servitude" on government lands and government agencies. *Lyng*, 485 U.S. at 452. As this Court wrote in *Lyng*:

> [G]overnment simply could not operate if it were required to satisfy every citizen's religious needs

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decisions in various other circumstances, including government-mandated autopsies of religious adherents. *See* Br. of *Amici Curiae* Religious Liberty Law Scholars 9-17. As an initial matter, such circumstances may well constitute the requisite coercion, depending on the factual setting. And the law professors' concerns are largely hypothetical in any event; the forced-autopsy issue, for example, has not produced even *one* RFRA decision in the courts of appeals, much less multiple conflicting decisions. As to the law professors' concerns about zoning, *see id.* at 14, RLUIPA provides additional protection for religious land use, including zoning decisions affecting churches. *See* 42 U.S.C. § 2000cc(b); *id.* § 2000cc-5(5).

> and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered * * * deeply offensive [to some citizens], and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment * * * can give to none of them a veto over public programs that do not prohibit the free exercise of religion. [485 U.S. at 452].

The evidence in this case illustrates how broad petitioners' proposed "veto" really is. According to petitioners, any snowmaking, even with fresh water, harms their religious beliefs. Pet. App. 225a, 249a. Indeed, any alteration to sacred land at all, no matter how localized, undermines those beliefs. *See, e.g.*, ER212-213 ("[T]he Peaks are like a single living entity" such that "you can't hurt or harm or destroy a piece * * * without it affecting the whole"). According to petitioners, then, most any government land-management decision that touches on sacred land could trigger strict scrutiny. That is a daunting proposition, given that "[m]illions of acres of public land" nationwide—including the entire Colorado River and Grand Canyon—are held sacred by Indian tribes. Pet. App. 244a-245a, SER1954. In the Southwest alone, there are at least 40 to 50 sacred mountains and 40,000 to 50,000 sacred sites, and "new sacred areas are continuously being created." Pet. App. 243a-245a. *See also* NCAI Br. 5 (stating that "tribal aboriginal territories are much larger than reservation boundaries and Indian tribes generally have concerns about the management of sacred land * * * throughout their aboriginal territories"). And the economic and recreational

activities conducted on these lands are extensive. The Peaks alone—one federal property among thousands—are home to timber harvesting, cattle grazing, camping, hiking, communications towers, a nature conservancy, gas and electric transmission lines, and much more. Pet. App. 217a-218a.

Petitioners' proposed rule, in short, would allow tribes to impose long and costly delays on, and in some cases a veto over,[11] federal land management projects of every stripe. *See Snoqualmie Indian Tribe* v. *FERC*, 545 F.3d 1207 (9th Cir. 2008) (applying standard adopted below to reject tribal claim that important hydroelectric power generator burdened religion and should be shut down). This Court recognized as much in *Lyng* and rejected precisely the rule of decision petitioners now advance. *Lyng*'s logic is fatal to petitioners' policy argument—and to the notion that this case warrants certiorari review.

---

[11] It is no answer to say that some of these projects might survive strict scrutiny. Petitioners' preferred strict-scrutiny regime would be triggered upon an allegation that one's internal belief system was impinged, meaning that in virtually every case, after satisfaction of that diaphanous threshold, the government would be put to its proof of a "compelling interest." That burden in turn may prove exceedingly difficult to surmount on an individualized basis; the government may not be able to demonstrate a compelling interest in, for example, pursuing a particular water-management project at a particular site. Petitioners' low strict-scrutiny threshold thus may effectively block the government from implementing any land management plans.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 08-846

In the Supreme Court of the United States

NAVAJO NATION, ET AL., PETITIONERS

v.

UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the use of recycled wastewater to make artificial snow on a mountain owned by the government and deemed sacred by petitioners does not "substantially burden" petitioners' exercise of religion under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-1.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-113a) is reported at 535 F.3d 1058. The opinion of the district court (Pet. App. 186a-267a) is reported at 408 F. Supp. 2d 866.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2008. On October 29, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 8, 2008. On November 20, 2008, Justice Kennedy further extended the time to January 5, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause of the First Amendment does not require neutral laws of general applicability to be justified by a compelling government interest, even if they substantially burden a religious practice. *Id.* at 882-890. In response, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*

In RFRA, Congress sought to overcome the effect of *Smith* by "restor[ing] the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)" and "guarantee[ing] its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1). Congress explained that the "compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5). Congress therefore provided:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000bb-1(b).

Although this Court invalidated RFRA as applied to the States and their subdivisions in *City of Boerne* v. *Flores*, 521 U.S. 507, 532-536 (1997), RFRA continues

to apply to the federal government, see 42 U.S.C. 2000bb-3(a).

2. a. The San Francisco Peaks (Peaks) are a series of mountains located in the Coconino National Forest, just north of Flagstaff, Arizona. Pet. App. 8a. One percent of the area of the Peaks is occupied by the Snowbowl ski resort area (Snowbowl). *Id.* at 8a, 216a. The United States Forest Service (Forest Service) designated the Snowbowl as a public recreation facility because the area "represent[s] an opportunity for the general public to access and enjoy public lands in a manner that the Forest Service could not otherwise offer in the form of a major facility anywhere in Arizona." *Id.* at 8a (internal quotation marks and citation omitted).

The Snowbowl has been in operation as a ski resort area since the 1930s. Pet. App. 9a. The Snowbowl currently is operated by respondent Arizona Snowbowl Resort Limited Partnership (ASR), pursuant to a special use permit issued by the Forest Service. *Id.* at 217a.

The Peaks have "long-standing religious and cultural significance to Indian tribes," including petitioners. Pet. App. 9a. Petitioners consider the Peaks to be a living entity. *Id.* at 9a, 224a. They conduct religious ceremonies on the Peaks and collect plants, water, and other materials from the Peaks for use in medicinal bundles and healing ceremonies. *Ibid.* According to petitioners, the very presence of the Snowbowl desecrates the spirituality of the Peaks for them. *Ibid.*

b. Indian Tribes have previously challenged the operation of the Snowbowl. In 1979, the Forest Service approved a number of upgrades for the Snowbowl, which included the installation of new lifts, trails, and facilities. Pet. App. 9a, 218a. Certain Tribes sued to halt the proposed development and to remove all existing ski facili-

ties, contending, *inter alia*, that the proposed development would violate their First Amendment right to the free exercise of religion. See *Wilson* v. *Block*, 708 F.2d 735, 739-740 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983), and 464 U.S. 1056 (1984). The Tribes argued that further "development of the Peaks would be a profane act" and would "seriously impair their ability to pray and conduct ceremonies upon the Peaks, and to gather from the Peaks the sacred objects * * * which are necessary to their religious practices." *Id.* at 740.

The D.C. Circuit held that the proposed Snowbowl upgrades did not impermissibly burden the Tribes' free exercise of religion. *Wilson*, 708 F.2d at 739-745. The court explained that the government "has not conditioned any benefit upon conduct proscribed or mandated by plaintiffs' beliefs," "has not directly or indirectly penalized the plaintiffs for their beliefs," and has not "prevent[ed] them from engaging in any religious practices." *Id.* at 741-742, 745. Since *Wilson*, the Tribes have "continued to use the Peaks for religious purposes." Pet. App. 218a.

c. In recent years, snowfall at the Snowbowl has been sporadic, threatening the ski resort's continued operation. Pet. App. 10a, 218a-219a. In 2002, ASR submitted a proposal to the Forest Service to upgrade its operations at the Snowbowl. *Id.* at 10a. ASR did not propose to expand the Snowbowl area on the Peaks, but only to upgrade existing facilities and infrastructure. *Id.* at 187a n.2, 222a. One aspect of the proposal is that, to maintain the continued viability of the Snowbowl, ASR plans to make artificial snow using recycled wastewater. *Id.* at 10a-11a. The area proposed for snowmaking constitutes "approximately one quarter of one percent" of the Peaks. *Id.* at 222a.

The artificial snow would be made from recycled wastewater designated Class A+, which is the highest quality of recycled wastewater recognized by the Arizona Department of Environmental Quality (ADEQ). Pet. App. 10a-11a. In order to obtain Class A+ status, the water would have to undergo advanced treatment, including tertiary treatment with disinfection, and it would be monitored and tested frequently to assure that any pathogens are successfully removed. *Id.* at 11a n.6. Class A+ water has been specifically approved by the ADEQ as safe for many purposes, including irrigating school grounds and food crops, fire protection, and, as relevant here, making artificial snow. *Id.* at 11a; see Ariz. Admin. Code R18-11-309 tbl. A (2003). The proposal includes the use of recycled water, rather than fresh water, because of the scarcity of fresh water in Arizona. Pet. App. 253a.

In addition to using the recycled water for snowmaking, ARS also proposed to use it for a fire suppression system on the Peaks. Pet. App. 11a. The pipeline used to transport water to the Snowbowl would provide water for fire suppression in rural residential areas. *Ibid.* A reservoir of water would also be kept on the Snowbowl for fighting forest fires. *Ibid.*

Petitioners objected to the use of recycled water at the Snowbowl. In their view, use of the water would desecrate the Peaks and offend their religious beliefs. Pet. App. 6a-7a. Although "there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow," and petitioners would "continue to have virtually unlimited access to the mountain," including the Snowbowl, "to pray, conduct their religious ceremonies, and collect plants for religious

use," petitioners contended that the use of artificial snow would affect their "subjective spiritual experience" by "decreas[ing] the spiritual fulfillment [they] get from practicing their religion on the mountain." *Id.* at 6a-7a.

d. The Forest Service conducted an extensive review of the proposed project. Pet. App. 11a. As part of its review, it consulted with several Tribes to attempt to mitigate the effects of the proposed project on their religious activities. The Forest Service made over 500 contacts with Tribes that could be affected by the proposal and held between 40 and 50 meetings with them. *Ibid.*; see *id.* at 208a n.11, 210a, 219a. The Forest Service altered the proposed project in numerous respects to accommodate concerns raised by the Tribes. For example, the Forest Service eliminated the part of the proposal calling for the installation of lights to permit night skiing because some Tribes objected. *Id.* at 209a n.12. The Forest Service also signed a Memorandum of Agreement formally stating that it would continue to allow the Tribes access to the Peaks for cultural and religious purposes and to work with the Tribes to ensure that their religious activities on the Peaks would not be interrupted. *Id.* at 12a, 250a-252a.

After completing its review, the Forest Service issued an environmental impact statement and a record of decision authorizing a number of upgrades to the Snowbowl. Pet. App. 13a, 189a-190a. The Forest Service concluded that, without the proposed upgrades, the Snowbowl would not continue to be economically viable in low-precipitation years. *Id.* at 193a-195a, 264a-265a.

Petitioners filed an administrative appeal of the Forest Service's decision, which was denied. Pet. App. 13a. They then filed suit in federal district court, claiming

that the proposed project violated a number of federal statutes, including RFRA. *Ibid.*[1]

3. The district court held an 11-day bench trial on petitioners' RFRA claim, and then granted summary judgment for the Forest Service on all claims. Pet. App. 186a-267a.

The district court made extensive findings of fact about the extent to which the Snowbowl expansion would affect petitioners' religious beliefs and practices. Pet. App. 224a-241a. It found no evidence that the project would hinder the conduct of any religious ceremony, gathering, pilgrimage, or any other religious use of the Peaks. *Id.* at 228a, 231a-232a, 239a-240a, 259a, 261a. Instead, it found that the sole effect of the project would be on petitioners' subjective religious experience. *Id.* at 239a-240a. The court also observed that, because petitioners consider almost a dozen mountains and numerous other landscapes in the Coconino National Forest sacred, the "Forest Service would be hard pressed to satisfy the religious beliefs" of all of the petitioners. *Id.* at 243a-245a, 249a.

The district court explained that, to make out a prima facie claim under RFRA, petitioners were required to demonstrate that the proposed project "substantially burdens [their] ability to freely exercise

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[1] The only claim that petitioners continue to press before this Court is the claim that the proposed project violates RFRA. See Pet. App. 13a n.8 (noting that on appeal petitioners abandoned their claims under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, Grand Canyon National Park Enlargement Act, 16 U.S.C. 228a *et seq.*, and National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*); *id.* at 39a-42a (rejecting petitioners' claims under the National Environmental Policy Act of 1969, 16 U.S.C. 4321 *et seq.*, and National Historic Preservation Act, 42 U.S.C. 470 *et seq.*).

[their] religion." Pet. App. 255a (citing 42 U.S.C. 2000bb-1(b) and *Guam* v. *Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002)). If that showing is made, the court stated, the burden would shift to the government to demonstrate that the project furthers a compelling governmental interest using the least restrictive means available. *Id.* at 255a-256a.

The district court concluded that petitioners had failed to demonstrate a substantial burden on their religious exercise. Pet. App. 256a-261a. The court explained that "[t]he subjective views and beliefs presented at trial, although sincerely held, are not sufficient for the proposed project to constitute a substantial burden," because the project "does not coerce individuals into acting contrary to their religious beliefs" or "penalize anyone for practicing his or her religion." *Id.* at 260a-261a.

Citing this Court's decision in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the district court explained that "[a]llowing such a subjective definition of substantial burden would open the door to the imposition of 'religious servitudes' over large portions of federal land" and make it nearly impossible for the Forest Service to manage the "millions of acres of public lands in Arizona, and elsewhere, that are considered sacred to Native American tribes." Pet. App. 258a-260a. The district court also concluded that, even if there were a substantial burden on petitioners' religious beliefs, the government demonstrated that the proposed project was narrowly tailored to further a substantial government interest. *Id.* at 241a-255a, 261a-265a.

4. A three-judge panel of the court of appeals reversed. Pet. App. 116a-185a. The court of appeals then

granted en banc review and affirmed the district court's grant of summary judgment to the Forest Service. *Id.* at 1a-42a.

The en banc court of appeals explained that, "[w]ith the enactment of RFRA, Congress created a cause of action for persons whose exercise of religion is substantially burdened by a government action." Pet. App. 16a (citing 42 U.S.C. 2000bb-1). Noting that the government did not question whether petitioners' religious beliefs are sincere or whether petitioners' activities on the Peaks constitute an exercise of religion, *id.* at 17a, the court turned to the question whether the proposal would substantially burden petitioners' exercise of religion. *Id.* at 17a-35a.

The court explained that, under RFRA, that question is to be answered by reference to this Court's pre-*Smith* Free Exercise Clause precedents. Congress expressly stated in RFRA that its intention was to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," based on its determination that that test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." Pet. App. 17a-18a (quoting 42 U.S.C. 2000bb(a)(5) and (b)(1)). The court therefore reviewed this Court's decisions in *Sherbert*, *Yoder*, and their progeny to determine what constitutes a substantial burden on the exercise of religion.

After reviewing this Court's pre-*Smith* precedents in detail, the court of appeals concluded that a government action generally constitutes a substantial burden on religion if "individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to

their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." Pet. App. 20a. "Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens." *Ibid.*

Applying those principles to the facts found by the district court (which petitioners did not challenge on appeal), the court concluded that petitioners failed to demonstrate a substantial burden on their exercise of religion. Pet. App. 21a-35a. The court observed that "[t]he only effect of the proposed upgrades is on [petitioners'] subjective, emotional religious experience"; they claim the project would "decrease the spiritual fulfillment they get from practicing their religion on the mountain." *Id.* at 21a. The court determined that, under this Court's precedents, "the diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of religion." *Ibid.*

The court of appeals determined that this Court's decision in *Lyng* is "on point." Pet. App. 22a. In *Lyng*, the Court rejected several Tribes' claim that construction of a logging road through a national forest would substantially burden their exercise of religion. 485 U.S. at 441-442. The Court explained that the Tribes' claim that the project would "diminish the sacredness" of the land did not impose a burden "heavy enough" to violate the Free Exercise Clause. *Id.* at 447-449. The court of appeals explained that, "[l]ike the Indians in *Lyng*, [petitioners] here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment," and, like the challengers in *Lyng*, they failed to demonstrate a substantial burden. Pet. App. 25a.

Three judges dissented, contending that the use of artificial snow on the peaks would substantially burden petitioners' religious exercise. Pet. App. 43a-113a (W. Fletcher, J., dissenting).

ARGUMENT

Petitioners seek review of the court of appeals' decision that the diminishment of spiritual fulfillment does not constitute a substantial burden on the exercise of their religion under RFRA. Pet. i. The decision below is correct. In determining that petitioners failed to demonstrate a substantial burden, the court of appeals followed settled law, including this Court's decision in *Lyng*, which squarely rejected a claim that is indistinguishable from the one petitioners now make. Moreover, contrary to petitioners' contention, the courts of appeals have not divided on the question of what constitutes a substantial burden under RFRA. And even if there were disagreement in the circuits, this case would be an inappropriate vehicle for resolving that disagreement, because petitioners cannot prevail under any of the suggested standards. Further review of petitioners' fact-bound claim is therefore unwarranted.

1. a. RFRA provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that the application of the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. As this Court noted in *City of Boerne*, 521 U.S. at 512-513, Congress enacted RFRA in "direct response" to the Court's decision in *Smith*, which held that neutral laws of general applica-

bility that impose a substantial burden on religious exercise need not be justified by a compelling governmental interest. See 494 U.S. at 885. Congress sought to overcome the holding of *Smith* and directed courts to apply the compelling interest test to "all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1). RFRA specifically points the courts to "Federal court rulings" prior to *Smith* to assess whether a governmental action places an impermissible burden on religion. 42 U.S.C. 2000bb(a)(5).

b. The court of appeals correctly explained that, because Congress's purpose in RFRA was to restore the state of the law prior to *Smith*, this Court's pre-*Smith* Free Exercise Clause cases should be used to determine whether the government's use of artificial snow at the Snowbowl would substantially burden their exercise of religion, thus triggering the compelling interest test. Pet. App. 15a-28a, 38a. The court noted that this Court generally has recognized a substantial burden only when "individuals are forced to choose between following the tenets of their religion and receiving a government benefit" or are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Id.* at 20a.

An example of the first category of cases is *Sherbert* v. *Verner*, 374 U.S. 398 (1963), where the Court explained that a State could not deny a person unemployment benefits because she refused to work on the Sabbath, because such a rule would substantially burden her religious exercise by forcing her to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion * * * on the other." *Id.* at 404. An example of the latter category is *Wisconsin* v. *Yoder*,

406 U.S. 205 (1972), where the Court struck down application of a compulsory education law to Amish children, explaining that such a law would "unduly burden[]" the religious exercise of the children's parents by "affirmatively compel[ling] them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218, 220. In later cases, the Court continued to adhere to the view that a burden on religion is "substantial" when the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas* v. *Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981); see *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (same).

At the same time, this Court rejected the view that religious offense or distress resulting from the government's management of its own programs or property could constitute a substantial burden. In *Bowen* v. *Roy*, 476 U.S. 693 (1986), two applicants for welfare benefits challenged a federal statute requiring them to supply a Social Security number, contending that using a Social Security number to identify their 2-year-old daughter would "rob [her] spirit" and "prevent her from attaining greater spiritual power." *Id.* at 696. This Court held that the claimed injury was not a sufficient burden under the Free Exercise Clause, explaining that the Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700.

That principle was later reaffirmed in the specific context presented by this case—the government's management of federal lands for the public good. In *Lyng*, this Court considered three Tribes' challenges to gov-

ernment plans to permit timber harvesting in, and construction of a road through, a national forest traditionally used for religious practice by members of the Tribes. 485 U.S. at 442. The Tribes objected to the project, contending that the national forest area in question was an "indispensable part of Indian religious conceptualization and practice" and that the proposed project "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Ibid.*

The Court held that the alleged interference with the Tribes' "ability to pursue spiritual fulfillment according to their own religious beliefs" was not a substantial burden on religion that must be justified with a compelling governmental interest. *Lyng*, 485 U.S. at 448-450. Relying on *Roy*, the Court explained that, although the planned road construction would "interfere significantly with [the Tribes'] ability to pursue spiritual fulfillment according to their own religious beliefs," it would not "coerce[]" them "into violating their religious beliefs" or "penalize religious activity by denying [them] an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. The court concluded that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not sufficiently burden religion so as to "require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-451. The Court therefore rejected the Tribes' "proposed extension of *Sherbert*" and instead found the case controlled by *Roy*. *Id.* at 452.

c. The court of appeals correctly applied that settled law in holding that the proposed project does not "substantially burden" petitioners' religious exercise. Pet. App. 15a-35a. As the court explained, "[t]he only effect of the proposed upgrades is on [petitioners'] subjective, emotional religious experience," and under cases such as *Sherbert*, *Yoder*, *Roy*, and *Lyng*, "the diminishment of spiritual fulfillment * * * is not a 'substantial burden' on the free exercise of religion." *Id.* at 21a. The court determined that *Lyng* is dispositive of petitioners' claims, because in *Lyng*, as here, the Tribes "contended the construction would interfere with their free exercise of religion by disturbing a sacred area," and the Court concluded that the Tribes had not shown a "burden 'heavy enough' to violate the Free Exercise Clause." *Id.* at 23a (quoting *Lyng*, 485 U.S. at 447).

The court of appeals also explained that here, as in *Lyng*, a contrary holding would significantly interfere with the government's ability to manage its own land: "[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires," because "[a] broad range of governmental activities * * * will always be considered essential" to the spiritual well-being of some citizens and "deeply offensive" to others. Pet. App. 24a-25a (quoting *Lyng*, 485 U.S. at 452). The court of appeals thus correctly concluded that petitioners failed to demonstrate a substantial burden on their religious exercise in light of this Court's pre-*Smith* precedents, especially *Lyng*.

d. The government has never challenged the sincerity of the beliefs espoused by petitioners in this case, nor does it question the sincerity of the petitioners' description of the impact of the Snowbowl project on their religious experience. And the government recognizes the

importance of sensitivity to religious beliefs and practices. The government has endeavored to "accommodat[e] religious practices like those engaged in by" petitioners and to "minimize the impact [of the proposed project] on [petitioners'] religious activities." *Lyng*, 485 U.S. at 454. Although the government desires to accommodate religious activities to the extent practicable, *Lyng* makes clear that the government was not required to do more in this case.

2. Petitioners provide a variety of arguments (Pet. 24-31) for why the court of appeals erred, none of which is persuasive.

a. First, petitioners suggest (Pet. 24-28) that the court ignored the "plain language" of RFRA by turning to this Court's pre-*Smith* precedent rather than using dictionary definitions of "substantial" and "burden." But, as the court of appeals explained, petitioners' proposed approach is directly contrary to Congress's express direction to courts to look to *Sherbert*, *Yoder*, and this Court's other pre-*Smith* Free Exercise Clause precedents to determine when the government must justify its actions with a compelling governmental interest. Pet. App. 29a-30a (citing 42 U.S.C. 2000bb(a)(4)-(5) and (b)(1)). Because "Congress incorporated into RFRA a term of art—substantial burden—previously used in numerous Supreme Court cases," the court of appeals appropriately determined that it should not "invent a new definition for 'substantial burden' by reference to a dictionary." *Id.* at 30a. Congress expected that "the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993) (*1993 Senate Report*). Moreover, contrary to petitioners' contention

(Pet. 2-3, 28-29), Congress did not intend RFRA's compelling interest test to apply to any incidental effects on religious exercise; Congress created a cause of action for any individual only "where free exercise of religion is *substantially* burdened." 42 U.S.C. 2000bb(b)(1) (emphasis added).

b. Petitioners also contend (Pet. 26-28) that cases such as *Sherbert*, *Yoder*, and *Lyng* do not address what constitutes a substantial burden on religious exercise. They are mistaken. The relevant inquiry in each of those cases was whether the claimed interference with religious practice was sufficiently severe to require the government to justify its actions with a compelling governmental interest under the Free Exercise Clause. See, *e.g.*, *Sherbert*, 374 U.S. at 403 (holding that there was a sufficient "burden" on religious exercise to require the government to show a compelling governmental interest); *Yoder*, 406 U.S. at 220 (finding an "undu[e] burden[]" that required the State to show a compelling interest); *Lyng*, 485 U.S. at 447 (concluding that Tribes failed to show that "the burden on their religious practices [wa]s heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the" project at issue); see also Pet. App. 17a-28a, 30a n.17. And Congress specifically noted that *Roy* and *Lyng* would apply in cases such as this one: "[P]re-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." *1993 Senate Report* 9 (citing *Roy* and *Lyng*).

c. Petitioners attempt to rewrite the holding of *Lyng*, contending that "[b]y any reasonable understand-

ing of the English language * * * this Court accepted that the governmental action in *Lyng* would substantially burden tribal members' exercise of religion." Pet. 28. That is incorrect. This Court squarely rejected the contention that "the burden on [the Tribes'] religious practices is heavy enough" to require the government to demonstrate that the proposed project was justified by a compelling governmental interest. *Lyng*, 485 U.S. at 447.

d. Petitioners likewise are wrong to suggest that the *Lyng* Court "held that the Free Exercise Clause subjects governmental action to strict scrutiny only when the action actually 'prohibit[s]' religious expression." Pet. 28. The *Lyng* Court made clear that there would be a substantial burden on religion if individuals were "coerced by the Government's action into violating their religious beliefs" or the government "penalize[d] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens," even if their religious exercise was not prohibited. 485 U.S. at 449. The court of appeals thus correctly concluded that this case is indistinguishable from *Lyng*.

3. Contrary to petitioners' contention (Pet. 12-20), there is no disagreement in the circuits on the question of what constitutes a substantial burden under RFRA that warrants this Court's review.

a. As an initial matter, a great number of the cases petitioners cite as evidence of a circuit conflict are inapposite. Several of them were either abrogated by or vacated in light of this Court's decision in *City of Boerne*.[2]

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[2] See, *e.g.*, *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), vacated (in light of *City of Boerne*), 522 U.S. 801 (1997); *In re Young*, 82 F.3d 1407 (8th Cir. 1996), vacated (in light of *City of Boerne*) *sub nom. Christians* v. *Crystal Evangelical Free Church*, 521 U.S. 1114 (1997); *Goodall*

Other cases address not RFRA but the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*[3] Although both RLUIPA and RFRA provide that the government may not substantially burden religious exercise absent a compelling governmental interest, there are textual differences between the two statutes, such as RLUIPA's statement that it should be "construed in favor of a broad protection of religious exercise," 42 U.S.C. 2000cc-3(g), a sentiment not echoed in RFRA. In light of the fact that there are very few precedential cases that interpret the RFRA provisions at issue here, this Court's review is not warranted.

b. In any event, there is no conflict in the lower courts, even considering the full range of cases petitioners cite. In each of the cited cases, the court of appeals took the same approach as the court below, which was to look to this Court's pre-*Smith* Free Exercise Clause cases to determine when religious exercise has been substantially burdened. See pp. 21-25, *infra*. That is not surprising, because Congress made clear in enacting RFRA that what constitutes a substantial burden would be governed by this Court's pre-*Smith* precedents. See

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v. *Stafford County Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995), cert. denied, 516 U.S. 1046 (1996), abrogated by *City of Boerne*, *supra*; *Werner* v. *McCotter*, 49 F.3d 1476 (10th Cir.), cert. denied, 515 U.S. 1166 (1995), abrogated by *City of Boerne*, *supra*.

[3] See, *e.g.*, *Longoria* v. *Dretke*, 507 F.3d 898 (5th Cir. 2007) (per curiam); *Washington* v. *Klem*, 497 F.3d 272 (3d Cir. 2007); *Adkins* v. *Kaspar*, 393 F.3d 559 (5th Cir. 2004), cert. denied, 545 U.S. 1104 (2005); *Midrash Shepardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2006); *Civil Liberties for Urban Believers* v. *City of Chi.*, 342 F.3d 752 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004).

42 U.S.C. 2000bb(a)(5) and (b)(1). Petitioners have not identified *any* court of appeals that has cast aside those precedents and looked solely to dictionary definitions to answer that question.

In applying this Court's pre-*Smith* Free Exercise Clause precedent, the courts of appeals have all adopted essentially the same conception of what government activities substantially burden religious exercise. They have asked whether the government action in question coerces an individual to engage in or to forgo engaging in religious exercise. See pp. 21-25, *infra*. And they have understood that inquiry to follow directly from this Court's decisions in *Sherbert*, *Yoder*, and their progeny. See *Washington* v. *Klem*, 497 F.3d 272, 279 (3d Cir. 2007) (the courts of appeals "have adopted some form of the *Sherbert/Thomas* formulation").

Although the courts of appeals have sometimes used different language to explain what constitutes a "substantial burden," those differences do not evidence any divergence in legal approach that warrants this Court's review. Instead, they are a reflection of the courts' application of the test for what constitutes a substantial burden to the facts of individual cases. Importantly, the courts of appeals themselves have not identified a legal disagreement. Instead, the few courts that have identified semantic differences among the circuits have observed that those differences probably "come to nothing in practice." *Mack* v. *O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996), vacated (in light of *City of Boerne*), 522 U.S. 801 (1997); see *Klem*, 497 F.3d at 279-280 (in RLUIPA context, noting "minor variations" in various courts' definitions of "substantial burden," but questioning whether those "semantic differences in definition result in any meaningful differences in application"). Because the

courts of appeals have hewed closely to this Court's precedents in assessing whether a plaintiff has demonstrated a substantial burden on his religious exercise, there is no need for this Court's intervention.

c. An examination of the particular cases petitioners cite confirms that there is no disagreement in the courts of appeals on the question presented. In the decision below, the court of appeals reviewed this Court's pre-*Smith* Free Exercise Clause cases and then summarized their holdings by stating: "[A] 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." Pet. App. 20a. As petitioners acknowledge (Pet. 13), the Fourth Circuit and D.C. Circuit have stated the inquiry in the same way, asking whether the government action at issue "forces [the plaintiffs] to engage in conduct that their religion forbids or * * * prevents them from engaging in conduct their religion requires." *Henderson* v. *Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001), cert. denied, 535 U.S. 986 (2002); see *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 172-173 (4th Cir. 1995) (plaintiffs "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action that their religion mandates that they take"), cert. denied, 516 U.S. 1046 (1996), abrogated by *City of Boerne*, *supra*. That inquiry follows directly from this Court's decision in *Thomas*, which stated that there is a substantial burden "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief,

thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." 450 U.S. at 717-718; see Pet. App. 19a; *Henderson*, 253 F.3d at 16; *Goodall*, 60 F.3d at 172.

Contrary to petitioners' contention, the Eighth and Tenth Circuits have not adopted a "much broader conception of 'substantial burden.'" Pet. 13. Instead, like the court below, those courts have looked to this Court's pre-*Smith* Free Exercise Clause precedents for guidance and focused on whether the government action in question coerces a person to engage in religious activity or forgo engaging in religious activity. See *In re Young*, 82 F.3d 1407, 1417-1419 (8th Cir. 1996), vacated (in light of *City of Boerne*) *sub nom. Christians* v. *Crystal Evangelical Free Church*, 521 U.S. 1114 (1997); *Werner* v. *McCotter*, 49 F.3d 1476, 1479-1480 & n.1 (10th Cir.), cert. denied, 515 U.S. 1166 (1995), abrogated by *City of Boerne*, *supra*. In *Werner*, the Tenth Circuit tailored that inquiry to the particular factual context of state prisons, asking whether the prison regulations at issue "significantly inhibit[ed] or constrain[ed] conduct or expression that manifests some central tenet of a prisoner's individual beliefs," "meaningfully curtail[ed] a prisoner's ability to express adherence to his or her faith," or "den[ied] a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion." 49 F.3d at 1480. The Eighth Circuit used the same inquiry in the state prison context in *Weir* v. *Nix*, 114 F.3d 817, 820 (1997), and then also utilized it to evaluate a law permitting a bankruptcy trustee to void a transfer of funds debtors had tithed to their church, see *In re Young*, 82 F.3d at 1418. In none of those cases did the court suggest that it viewed its inquiry as conflicting with the approach of the Fourth,

Ninth, and D.C. Circuits. Indeed, the courts have utilized one another's explanations of what constitutes a substantial burden, evidencing their belief that their approaches are interchangeable. See, *e.g.*, *Henderson*, 253 F.3d at 16 (considering, *inter alia*, whether the government action at issue "significantly inhibit[ed] or constrain[ed] conduct or expression that manifests some tenet of [the plaintiff's] individual beliefs," the same inquiry undertaken by the Eighth and Tenth Circuits) (quoting *Werner*, 49 F.3d at 1480).

There is likewise no basis for concluding that the Third, Fifth, Seventh, or Eleventh Circuit has adopted an approach that conflicts with the decision below. Again, each of those courts has looked to this Court's pre-*Smith* Free Exercise Clause cases to determine whether a challenged government action substantially burdens religious exercise, albeit in the context of RLUIPA, rather than RFRA. See, *e.g.*, *Klem*, 497 F.3d at 278-279; *Adkins* v. *Kaspar*, 393 F.3d 559, 569-570 (5th Cir. 2004), cert. denied, 545 U.S. 1104 (2005); *Midrash Sheparди, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1226-1227 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005); *Civil Liberties for Urban Believers* v. *City of Chi.*, 342 F.3d 752, 760-761 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004). For example, the Fifth Circuit has asked whether the government action at issue "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs" by "influenc[ing] the adherent to act in a way that violates his religious beliefs" or "forc[ing] the adherent to choose between * * * enjoying some generally available, nontrivial benefit, and * * * following his religious beliefs." *Adkins*, 393 F.3d at 570; see *Longoria* v. *Dretke*, 507 F.3d 898, 903 (5th Cir. 2007) (per curiam). The

Third Circuit utilized that same inquiry in *Klem*, 497 F.3d at 280 & n.7. That inquiry tracks this Court's decision in *Sherbert*, see 374 U.S. at 404, and *Thomas*, see 450 U.S. at 717-718, and it is wholly consistent with the court of appeals' approach below, see Pet. App. 20a (asking whether "individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)").

Similarly, the Eleventh Circuit has focused on the coercive effect of the challenged government action, asking whether the government has exerted "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly," such as "pressure that tends to force adherents to forgo religious precepts" or "pressure that mandates religious conduct." *Midrash Shapardi, Inc.*, 366 F.3d at 1227. The Eleventh Circuit used that language as a shorthand for the rules announced by this Court in *Sherbert*, *Thomas*, *Hobbie*, and *Lyng*, *id.* at 1226-1227, and that language reflects essentially the same approach as used by the court below.

Finally, petitioners cite (Pet. 16) the Seventh Circuit's decision in *Civil Liberties for Urban Believers* v. *City of Chicago*, *supra* (*CLUB*), as evidence of a circuit conflict. *CLUB* addressed only a RLUIPA claim, not a RFRA claim, and the court of appeals defined substantial burden only in the particular context of land-use regulations, stating: "[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise * * * effectively impracticable." 342 F.3d at 761. The court of

appeals did not purport to define substantial burdens in other contexts, and it recognized that whether a government action imposes a substantial burden on religious exercise should be decided by applying this Court's pre-*Smith* precedents. See *id.* at 760-761. Moreover, as the Seventh Circuit had recognized in an earlier case, its approach to identifying substantial burdens in the RFRA context is consistent with that of other courts, because it too asks whether the challenged governmental action coerces a person to engage in or forgo engaging in religious exercise. See *Mack*, 80 F.3d at 1178-1179. Although there are "verbal differences" among the circuits in defining substantial burdens under RFRA, the court explained, there is no reason to believe that those differences are meaningful or that any of the courts' holdings are inconsistent. *Id.* at 1178. There is, accordingly, no division in the circuits warranting this Court's review.

d. Review is particularly unwarranted in this case because petitioners' particular claim is foreclosed by this Court's pre-*Smith* precedent in *Lyng*, as incorporated into RFRA, and petitioners could not prevail under any circuit's standard. The courts of appeals have uniformly looked to this Court's precedents to define substantial burdens under RFRA. As explained, *Lyng* makes clear that diminished spiritual fulfillment, the injury petitioners allege, does not qualify. See *Lyng*, 485 U.S. at 447-448 (Tribes' belief that the plans to build a logging road would "diminish the sacredness" of the land did not impose a burden "heavy enough" to violate the Free Exercise Clause.); see pp. 13-15, *supra*. As the court of appeals recognized, a contrary rule would make any federal government land-use decision "subject to the personalized oversight of millions of citizens," where

"[e]ach citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs," even though the land at issue "is, by definition, land that belongs to everyone." Pet. App. 7a. As the *Lyng* Court recognized, the government "simply could not operate" under those circumstances. 485 U.S. at 451-453.

Petitioners have not identified *any* circuit that has held that the type of injury they identify constitutes a substantial burden on religious exercise under RFRA. Indeed, only one cited court of appeals decision considered a challenge to a federal government land-use decision, and it squarely rejected that claim. See *Henderson*, 253 F.3d at 16-17. Further, there is no reason to believe that any court of appeals would recognize such a claim, because the courts have generally asked whether the government action in question coerces an individual to engage in or to forgo engaging in religious exercise, and petitioners have acknowledged that the use of recycled water to make snow at the Snowbowl will not coerce them to change the conduct of their religious practices. The record in fact establishes that there would be no effect on those practices. See, *e.g.*, Pet. App. 6a ("there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow" and petitioners would "continue to have virtually unlimited access to the mountain" for "pray[er], conduct[ing] their religious ceremonies, and collect[ing] plants for religious use"). Therefore, even if there were a disagreement in legal approach warranting this Court's review, this case would be a poor vehicle in which to consider it, because petitioners' claim is foreclosed by this Court's pre-*Smith* precedent in *Lyng* and

because petitioners have not demonstrated that they could prevail under *any* circuit's standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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REPLY BRIEF ROR PETITIONERS

Respondents cannot deny the extraordinary significance of this case to the petitioner tribes. Congress itself recognized in the American Indian Religious Freedom Act of 1978 that "the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage" because "such practices form the basis of Indian identity and value systems." Pub. L. No. 95-341 (1978). No religious practices are more fundamental to Southwest Indian tribes than those related to the San Francisco Peaks. *See* Pet. for Cert. 3-6. That is why the Navajo Nation, for instance, views the potential desecration of the Peaks with treated wastewater as "an emergency matter which directly threatens the sovereignty of the Navajo Nation." Resolution of the Twenty-First Navajo Nation Council, CAP-16-09 (Apr. 22, 2009). The twelve other tribes that revere the Peaks share this view with respect to their own tribal identities and religious customs.

This serious threat to the cultural traditions of thirteen dependent nations – representing over 400,000 Native Americans – is reason alone to grant review. *See, e.g., United States Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) (granting certiorari in absence of circuit split because of appellate decision's "significant impact on the relationship between Indian tribes and the Government"); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (granting certiorari because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for

many eastern Indian land claims"); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 141 (1972) (granting certiorari "because of the importance of the issues for [certain] Indians"); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 424 (1943) ("We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States."). But even setting that consideration aside, this case, contrary to respondents' arguments, easily meets this Court's criteria for certiorari. The Ninth Circuit erred in concluding that "subjectively" inhibiting the tribes' religious practices relating to their most sacred site would not substantially burden their free exercise of religion. And the Ninth Circuit's decision punctuates years of escalating conflict among the federal courts of appeals over how to construe and to apply RFRA's triggering mechanism.

1. Neither respondent even attempts to argue that the court of appeals' definition of the statutory phrase "substantial burden" accords with the words' ordinary meaning. Nor does either respondent try to reconcile the Ninth Circuit's definition with various types of encumbrances on religious liberty, such as enduring unwanted autopsies, that this Court and others have recognized that RFRA is meant to cover. *See* Pet. for Cert. 25; *Amicus* Br. of Religious Liberty Law Scholars 10-16 (collecting examples). That the Ninth Circuit's opinion cannot be defended on either of these elementary grounds of statutory interpretation – plain meaning and congressional purpose – demonstrates the need to grant certiorari.

The argument that respondents do offer in defense of the Ninth Circuit's opinion does little to

dispel the need for this Court's intervention. Respondents' argument proceeds in two steps. They first argue that "Congress intended courts to look to pre-*Smith* Free Exercise case law in construing the term 'substantial burden.'" Snowbowl BIO 14; *accord* SG BIO 12. Second, respondents argue that this Court's pre-*Smith* decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), establishes that interfering with Native Americans' ability to pursue spiritual fulfillment through land-based religious practices does not substantially burden their free exercise of religion. Neither of these propositions withstands scrutiny.

a. Nothing in RFRA directs courts to define "substantial burden" with reference to pre-*Smith* case law. As the petition for certiorari explains, that was not even a phrase that this Court's pre-*Smith* case law commonly used. *See* Pet. for Cert. 26.

To be sure, RFRA observes that "*the compelling interest test* as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5) (emphasis added). RFRA, therefore, provides that one of its purposes is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." § 2000bb(b)(1). But neither of these statutory passages says anything about how to construe RFRA's distinct "substantial burden" requirement. When RFRA discusses *that* requirement in subsequent passages, it makes no reference whatsoever to pre-*Smith* case law. *See* § 2000bb(b)(1) (purpose of RFRA is "to guarantee [the application of

the compelling interest test] in all cases where free exercise of religion is substantially burdened"); § 2000bb(b)(2) (RFRA is intended "to provide a claim or defense to persons whose religious exercise is substantially burdened").

That being so, when the government says that "RFRA specifically points the courts to 'Federal court rulings' prior to *Smith* to assess whether a governmental action places an impermissible burden on religion," SG BIO 12 (quoting § 2000bb(a)(5)); *see also* SG BIO 19, it quotes RFRA's language out of context and misrepresents what RFRA provides. The fact is that Congress coined the term "substantial burden" in RFRA. While respondents and courts such as the Ninth Circuit may wish Congress had used the First Amendment's restrictive term "prohibit" (or some synonym such as "coerce") to tether the statute's triggering mechanism to pre-*Smith* case law, this does not justify acting as if Congress actually did so.

b. Even if this Court's pre-*Smith* free-exercise case law were relevant to construing RFRA's substantial burden requirement, nothing in *Lyng* suggests that significantly inhibiting individuals' subjective spiritual expressions does not "substantially burden" their exercise of religion. To the contrary, this Court took for granted in *Lyng* that the governmental action there would have "devastating effects" on traditional religious practices and would "virtually destroy the . . . Indians' ability to practice their religion." 485 U.S. at 451 (internal quotation marks and citation omitted).

This Court rejected the Native Americans' free exercise claim in *Lyng* not because of the absence of a

substantial burden, but rather because "[t]he crucial word *in the constitutional text* is 'prohibit.'" *Id.* (emphasis added). The *Lyng* Court acknowledged that it had stretched that term in other pre-*Smith* cases to cover "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Id.* at 450. This Court also has held that governmental action that "target[s]" an activity "because of its religious motivation" triggers strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 542 (1993); *accord id.* at 559 (Souter, J., concurring); *id.* at 577-78 (Blackmun, J., concurring). But the Court in *Lyng* refused to extend the term "prohibit" to cover "incidental" – that is, unintentional – "effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs." 485 U.S. at 450. *Lyng* held, in other words, that although the government's desecration of the Indians' sacred site would substantially burden their exercise of religion, the burden was incidental and therefore insufficient under the Free Exercise Clause to trigger *Sherbert* and *Yoder*'s compelling interest test. *See Employment Div. v. Smith,* 494 U.S. 872, 883 (1990) (explaining that *Lyng* "declined to apply *Sherbert* analysis to the Government's logging and road construction activities" because those activities were "generally applicable" governmental actions).

Once *Lyng*'s holding is brought into focus, the only real question is whether RFRA, like the Free Exercise Clause as explicated in *Lyng*, excludes substantial but incidental burdens on religious

practice from its coverage. The government claims that it does, asserting that "Congress did not intend RFRA's compelling interest test to apply to any incidental effects on religious exercise." SG BIO 17. But this Court has already squarely rejected that argument, explaining that the very purpose of RFRA is to trigger strict scrutiny *whenever* "the exercise of religion has been burdened in an *incidental* way," "without regard to whether [the governmental action] stifl[es] or punish[es] free exercise" or targets it for harmful treatment. *City of Boerne v. Flores,* 521 U.S. 507, 534-35 (1997) (emphasis added). (In fact, this expanded coverage beyond what the First Amendment provides is one reason why this Court held RFRA unconstitutional as applied to states. *See id.*) Neither respondent offers any answer to the import of that holding here.[1]

2. Respondents contend that no conflict exists here because every court of appeals, like the Ninth

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[1] While ignoring *Boerne*, the government claims that two snippets of RFRA's legislative history show that Congress intended RFRA's "substantial burden" test to exclude burdens like the one here. *See* SG BIO 16-17. To whatever extent legislative reports are relevant, however, the House Judiciary Committee's Report on the legislation makes clear that the Ninth Circuit's coercion-based definition of the phrase is unduly restrictive. That report explains that in order to trigger the statute, "government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion." H.R. Rep. No. 88, 103d Cong., 1st Sess. 6 (1993).

Circuit, defines "substantially burdening" as "coerc[ing] an individual to engage in or to forgo engaging in religious exercise." SG BIO 20; *accord* Snowbowl BIO 30. This is incorrect. The test that the Eighth and Tenth Circuits have adopted has nothing to do with coercion. Those circuits ask whether governmental action "significantly inhibit[s] or constrain[s] [religious] conduct or expression" or "meaningfully curtail[s]" an individual's "ability to express adherence to his or her faith." *Werner v. McCotter,* 49 F.3d 1476, 1480 (10th Cir. 1995); *accord Weir v. Nix,* 114 F.3d 817, 820 (8th Cir. 1997).

While the government suggests there are nothing more than "semantic differences" between this test and the Ninth Circuit's, SG BIO 20, the government's own actions belie this suggestion. In *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), a Native American tribe objected to the government's plan to build a military training facility in a location that would have significantly inhibited the "spiritual experience" of tribal members. *Id.* at *17. Faced with the strength of that claim, the government urged the district court to disregard Tenth Circuit RFRA law in favor of the more "restrictive" definition of "substantial burden" that the Ninth Circuit adopted in this case. *Id.* at *3 n.5. The district court naturally rejected that dramatic request. The government then cancelled the project, further suggesting it did not think it could prevail under Tenth Circuit law. And even now, neither the government nor Snowbowl contests the correctness of the district court's ruling, under binding Tenth Circuit precedent, that the government's noncoercive

activity imposed a substantial burden on the Comanche Nation's religious liberty. This silence confirms that this case would come out differently in that circuit or in the Eighth Circuit.

One cannot predict with equal certainty how this case would come out in the circuits adopting intermediate definitions of RFRA's "substantial burden" requirement. But the government's suggestion that these courts would reach the same conclusion as the Ninth Circuit because they, too, "look[] to this Court's pre-*Smith* Free Exercise Clause cases to determine whether a challenged government action substantially burdens religious exercise," SG BIO 23, surely oversimplifies the matter. It is widely acknowledged, with all due respect to this Court, that "the pre-*Smith* accommodation jurisprudence as a whole was laced with confusion and contradiction." Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,* 61 U. Chi. L. Rev. 1245, 1307 (1994). Indeed, the Eleventh Circuit itself, one of the courts taking the intermediate view, has noted that this Court's pre-*Smith* jurisprudence "varied over time," such that *Lyng*'s emphasis on coercion was inconsistent with earlier decisions applying strict scrutiny to less oppressive governmental actions. *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1226-27 (11th Cir. 2004). Accordingly, confusion over the concept of substantially burdening religion will continue to reign until this Court steps in and articulates a uniform test.

3. Respondents' final gambit is to assert, as the Ninth Circuit did, that recognizing the effect of the government's action here for the substantial burden

that it is "would significantly interfere with the government's ability to manage its own land." SG BIO 15; *accord* Snowbowl BIO 32-34. This, of course, is a pure policy argument that should be directed to Congress, not to this Court. That respondents nonetheless press it here is particularly ironic in light of the fact that the *Smith* decision itself emphasized that the proper forum for debating the desirability of accommodating religious practices is "the political process." 494 U.S. at 890. Such a debate commenced following *Smith*, and religious groups succeeded in obtaining enhanced protection of religious liberty in RFRA. It is not for the government, or for this Court, to second-guess the wisdom of the result of that legislative process.

In any event, there is nothing alarming about affording RFRA's "substantial burden" requirement its ordinary meaning. This Court already has explained that it is entirely "feasib[le]" to conduct a "case-by-case" analysis of purported justifications for impinging on religious liberty. *Gonzales v. O'Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418, 436 (2006). And as a practical matter, the vast majority of governmental actions involving federal land – perhaps including the logging and road-building activities in *Lyng* itself – are narrowly tailored to serve compelling governmental interests in creating energy, developing and harvesting natural resources, and the like. *See* Pet. for Cert. 29-30.

This, however, is the outlier case. Here, the government, in its own words, proposes to allow "contaminat[ion of] the natural resources needed" for the petitioner tribes to perform religious "ceremonies

that have been, and continue to be, the basis for the[ir] cultural identity." Pet. App. 140a (panel opinion) (quoting 1 U.S. FOREST SERVICE, U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS 3-18 (2005)). The Navajo medicine man, for example, explained at trial (in testimony that the government insists it does not dispute, *see* SG BIO 15), that spraying recycled wastewater onto the Peaks will render him "unable to perform" the tribe's most important ceremony, the Blessingway – a ceremony that the Navajo have used for centuries to ensure wellbeing and prosperity through a connection with the divine. Pet. App. 141a-42a (panel opinion); *see also* Pet. App. 9a (en banc opinion). And all this to enable slightly better skiing at an already functioning commercial ski facility.

It is worth remembering that our government took the Peaks from petitioner tribes. It placed the tribes on reservations and pledged to respect their cultures and traditions. It is hardly implausible that Congress passed a law in 1993 providing under these rare circumstances that the tribes' religious liberty should be respected.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for certiorari, the petition should be granted.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE FRIENDS COMMITTEE ON NATIONAL LEGISLATION, THE LEADERSHIP CONFERENCE OF WOMEN RELIGIOUS, THE NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM, GRADYE PARSONS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE RUTHERFORD INSTITUTE, AND THE PRESIDING BISHOP OF THE EPISCOPAL CHURCH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY & INTEREST OF *AMICI*[1]

The Friends Committee on National Legislation ("FCNL") is a Quaker lobby in the public interest, and the largest peace lobby in Washington, D.C. Founded in 1943 by members of the Religious Society of Friends (Quakers), FCNL staff and volunteers work with a nationwide network of tens of thousands of people from many different races, religions, and cultures to advocate social and economic justice, religious freedom, peace, and good government. The Religious Society of Friends has been deeply committed to religious freedom since its founding in England in the 1650s. One of its prominent early members founded Pennsylvania to be a haven of religious freedom and his concepts were reflected in the First Amendment protections of religious freedom.

The Leadership Conference of Women Religious is a membership organization of elected leaders of religious congregations in the United States representing approximately 67,000 Catholic sisters.

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[1] Pursuant to Rule 37.2, all parties were given timely notice and consented to the filing of this brief. Pursuant to Rule 37.6, no party or counsel to any party authored any part of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. No person other than the amicus curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

It has a deep belief in religious freedom and respect for religious rituals of Native Americans.

The National Committee for Amish Religious Freedom was formed at a national meeting of friends of the Amish held at the University of Chicago in 1967 in response to the facts that the Amish throughout the United States were experiencing many governmental impositions, and that Amish religious beliefs often prevent them from defending themselves in legal proceedings. The National Committee for Amish Religious Freedom has undertaken the defense of constitutional rights of the Amish in many cases throughout the United States. Of particular note in this instance is ist role in the representation of the Amish respondents in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a case central to the issues that the petitioner seeks to have reviewed.

Gradye Parsons, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.3 million members in more than 10,000 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the policies adopted by the General Assembly regarding the free exercise of religion clause of the First Amendment of the U.S. Constitution. The religious

liberty and church autonomy guarantees of this clause are foundational to our understanding of the relationship between the church and state. The General Assembly has interpreted that the First Amendment applies when a person's right to express their religion is substantially burdened by actions of the federal government. Additionally, since the end of the Second World War, Presbyterian General Assemblies have consistently taken progressive positions on issues affecting Native Americans. An area of abiding concern for Presbyterians is that Native Americans have full freedom to practice their religion. The 200th General Assembly (1988) directed: That the PC (U.S.A.), as a matter of policy, sign on as amicus curiae to briefs that argue for the protection of First Amendment rights to practice land theologies, and that the PC (U.S.A.) join with other churches, civil liberties organizations, and traditional Indian people in an effort to bring to national awareness the gross violations of the First Amendment rights of traditional Indian People. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

The Rutherford Institute is an international civil liberties and human rights organization headquartered in Charlottesville, Virginia.

Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated. In particular, The Rutherford Institute provides representation and counsel to persons whose rights to freely exercise their religion have been violated, and on numerous occasions has presented claims in state and federal courts asserting violations of the First Amendment's Free Exercise Clause, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. The Institute also strives to educate the public about constitutional and human rights issues. The Rutherford Institute not only has represented parties in proceedings before this Court, but also has filed amicus curiae briefs in many of this Court's cases involving individual civil liberties.

The Presiding Bishop of the Episcopal Church, the Most Rev. Katharine Jefferts Schori, is the Chief Pastor of this hierarchical religious denomination of over 2 million members in some 7700 worshipping congregations in the United States and 16 other countries. The Episcopal Church has a significant ministry to Native Americans throughout the United States and maintains a "Navajo Area Mission" of members of that Nation on its reservation in parts of the States of Arizona, New Mexico, and Utah. The issues in this case involving the interpretation of RFRA are, moreover, of significance to the Church beyond its ministry to Native Americans and extend into numerous other contexts.

ARGUMENT

I. A Coherent Definition Of Substantial Burden Under Federal Civil Rights Laws Is Vital To Protect The Vitality Of Religious Expression In The United States.

The right of individuals to exercise a wide variety of religious belief is a central aspect of our Nation's protection of fundamental rights. The *amici*, both as religious organizations and as organizations concerned with the free exercise of religion, have direct concern for the ability of persons of all religious traditions to practice as their faith dictates. Federal and state laws that protect the free exercise of religion are therefore of great and immediate significance to them.

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, both provide a well-established mechanism to balance the important interests of religious exercise with the interests of the State. However, that balancing takes place only after the religious practitioner establishes that the governmental action in question will "substantially burden" its religious practice. This concept of substantial burden is thus the threshold issue; unless it is crossed, there is no balancing of competing interests and therefore no opportunity to protect legitimate religious activity.

The present split among the Circuits as to the standard to be applied when determining what constitutes a substantial burden on religious exercise, and the extraordinarily limited scope that the Ninth Circuit established, is therefore of great significance. Such a narrow and, we submit, incorrect reading of the term prevents consideration of these competing interests and thereby inappropriately limits the application of those statutes to a narrower scope than mandated by their text and by Congress' purpose in enacting them.

Amici will not reiterate the arguments of the Petitioners, with which they agree. We seek to add our voices to theirs in requesting that the Court clearly articulate a standard that would give effect to the words and intent of these statutes and provide essential protection to the expression of religion. We believe that an understanding of the scope of religious practices by the bodies that the *amici* represent and the necessity of protection will assist the Court in deciding whether to grant certiorari.

II. Interpretative Decisions Regarding "Substantial Burdens" Under The Religious Freedom Restoration Act Also Affect Claims Under The Religious Land Use And Institutionalized Persons Act And State Religious Freedom Laws.

While RFRA was held to apply only to the federal government in *City of Boerne v. Flores*, 521 U.S. 507 (1997), its substantial burden and

compelling interest test has been held to be the "same standard" as that of the Religious Land Use and Institutionalized Persons Act. 42 U.S.C. § 2000cc(a)(1); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006). Thus, the substantial burden standard enunciated by the Ninth Circuit has implications for all land use and institutionalized persons issues involving state and local governments.

Several States have also enacted Religious Freedom Restoration Acts or similar statutes of their own that rely on a "substantial burden" analysis: Alabama (ALA. CONST. Art. I, § 3.01); Connecticut (CONN. GEN. STAT. § 52-571b *et seq.*); Florida (West's F.S.A. § 761.01 *et seq.*); Idaho (I.C. § 73-401 *et seq.*); Illinois (775 I.L.C.S. 35/1 *et seq.*); New Mexico (N.M.S.A. § 28-22-1 *et seq.*); Oklahoma (51 OKL. ST. ANN. § 251 *et seq.*); Pennsylvania (71 P.S. § 2401 *et seq.*); Rhode Island (GEN. LAWS § 42-80.1-1 *et seq.*); South Carolina (S.C.C.A. § 1-32-20 *et seq.*); and Texas (V.T.C.A. CIVIL PRACTICE AND REMEDIES CODE, T.5 § 110.001, *et seq.*).

Some state courts also rely upon federal RFRA and RLUIPA precedent in the interpretation and application of their own RFRAs. *See, e.g., Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning and Zoning Com'n of Town of Newtown*, 941 A.2d 868 (Conn. 2008); *Warner v. City of Boca Raton*, 887 So. 2d 1023 (Fla. 2004).

Still other State Supreme Courts have interpreted their own constitutions by referencing this standard and federal precedent. Among the

states holding that their state constitutions still require application of the strict scrutiny standard to religious liberty claims are Indiana, *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443 (Ind. 2001); Minnesota, *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426 (Minn. 2002); Missouri, *Oliver v. State Tax Commission Of Missouri*, 37 S.W.3d 243 (Mo. 2001); Ohio, *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); Washington, *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); and Wisconsin; *State v. Miller*, 549 N.W.2d 235 (Wis. 1996).

The application of all such laws is impacted by the current conflict with respect to the "substantial burden" standard and the Ninth Circuit's decision.

III. The Restrictive "Substantial Burden" Standard Of The Ninth Circuit And Unsettled Circuit Law Unreasonably Restricts The Applicability Of Religious Freedom Laws To Protect A Wide Variety Of Religious Activity.

The petitioners carefully lay out the widely varying definitions of substantial burden that are currently being applied by the Circuits and *amici* will not repeat their arguments. However, there are certain clear flaws in the Ninth Circuit's new definition that we as religious bodies will demonstrate.

a. The new Ninth Circuit "substantial burden" definition would permit a wide range of governmental action to obstruct the free exercise of religion.

The Ninth Circuit panel held that a substantial burden is one that "prevent[s] the plaintiff from engaging in [religious] conduct or having a religious experience," Pet. App. 146a (quoting *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (internal quotation marks omitted) (alterations in original), and understood that authorizing the discharge of reclaimed sewage on the San Francisco Peaks would substantially burden the tribes' religious exercise under both Ninth Circuit precedent and the ordinary meaning of the phrase. However, the court *en banc* reinterpreted the phrase to adopt a narrower meaning, limiting it to the burdens imposed in the specific factual contexts of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Pet. App. 7a. It held:

> Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of criminal or civil sanctions (*Yoder*).

Pet. App. 20a. Since spraying sewage water on the San Francisco Peaks would not condition any government benefit on abstaining from religious conduct, nor would it prohibit petitioners from

engaging in such exercise upon pain of official sanction, the burden was therefore not "substantial."

As noted by the petitioners, this test is at odds with the statute's plain language and its congressional purpose. It is also not based on any actual language in *Sherbert* or *Yoder*, neither of which used the term "substantial burden." It shifts the issue of what constitutes a substantial burden under RFRA from a case-by-case inquiry into the impact on the religious practice at issue to the very different question of the *nature of the governmental action* that creates the burden, limiting it to the deprivation of governmental benefits or cri nal or civil coercion. *Sherbert* cannot be interpreted to support such an approach, since that decision focused its inquiry squarely on the effect of a governmental action on the religious practice at issue, and not on the *form* of the governmental action:

> But this is only the beginning, not the end, of our inquiry. For '(i)f the purpose or effect of a law is to impede the observance of one or all religions . . . , that law is constitutionally invalid even though the burden may be characterized as being only indirect.'

Sherbert, 374 U.S. at 403-4 (footnote and citations omitted). Similarly, the *Yoder* Court extensively reviewed Amish history and religious belief and practice. 406 U.S. at 216-18. The shift of the focus of inquiry from the effect on religious belief to the type of governmental regulation cannot be

supported by these precedents.

The *en banc* majority, ignoring the statutory language covering all acts of the federal government, has simply written out of the statute innumerable types of governmental actions that could burden religion. The Ninth Circuit's standard would be at odds with the decisions of various other federal circuits and state supreme courts that have not adopted such a binary approach to determining whether a burden is substantial.

Desecration of holy sites, the example presented in the Petition, is but one example. The history of religion's often tumultuous relationship with the government is replete with examples of governmental destruction of religious buildings and sacred objects. The Ninth Circuit's standard would allow such actions because while the burden would be severe and certainly "substantial," as that term is commonly understood, they would not render religious exercise punishable by sanctions or condition any government benefit upon its avoidance. This is *reductio ad absurdum*, as the modern equivalent of such actions—the government's exercise of its eminent domain powers—have been used to stifle religious exercise by simply taking religious property. *See, e.g.*, *Albanian Associated Fund v. Township of Wayne*, 2007 WL 2904194, at *7 (D.N.J. 2007); *Cottonwood Christian Center v. Cypress Redevelopment Agency*,

218 F. Supp. 2d 1203, 1226-1227 (C.D. Cal. 2002).[2]

Prisoners are particularly affected by this ruling, as RFRA protects inmates in federal institutions and RLUIPA guards such rights in state prisons. Given the fact that all aspects of daily life in penal institutions are controlled by the government, an analysis that finds burdens on religious exercise only in the sorts of actions enumerated by the Ninth Circuit would negate the body of law balancing religious freedom with legitimate governmental interests in this context.

The Third Circuit noted this difficulty in *Washington v. Klem*, where it understood that "transferring these definitions, which often arise in the denial of unemployment benefits, to a prison setting has not always been seamless because of the different factual scenarios presented by the institutional milieu."[3] 497 F.3d 272, 278 (3d Cir.

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[2] Both cases involved RLUIPA, which is similarly limited to actions that "substantially burden" religious exercise. 42 U.S.C. § 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, ...").

[3] The Third Circuit also noted that applying this Court's holdings to the RLUIPA context "runs into trouble . . . because Supreme Court precedent with respect to the definition of 'substantial burden' in the Free Exercise Clause context has not always been consistent." *Washington*, 497 F.3d at 278.

2007). After an extended analysis of the meaning of the term "substantial burden" under the Religious Land Use and Institutionalized Persons Act, the court held that a limitation on the number of books inmates may possess in their cells did substantially burden the plaintiff's religious exercise. This would not comport with the new Ninth Circuit standard.

Nor can the standard be coherently applied to the land use branch of RLUIPA. In *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), the Second Circuit found that the denial of a land use permit to expand a Jewish school constituted a substantial burden on the schools' religious exercise because there was no viable alternative that it deemed adequate to teach its students. The court observed that the *Sherbert* framework was simply not applicable:

> [I]n the context of land use, a religious institution is not ordinarily faced with the same dilemma of choosing between religious precepts and government benefits. When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed.

Id. at 348-9. The religious body was not coerced into performing any act contrary to their religious beliefs by the threat of criminal or civil sanctions as in *Yoder*. As is often the case in land use issues, the governmental action that burdens religious exercise

by withholding necessary permissions does not neatly fit into either of the two narrow categories circumscribed by the new Ninth Circuit definition.

The limitation of substantial burden to the particular fact patterns involved in *Sherbert* and *Yoder* has the effect of distorting the proper inquiry into the nature of the effect of governmental action on religious exercise. Neither *Sherbert* nor *Yoder* suggest that the Court was attempting to define the term substantial burden or that their particular fact patterns should define the outer limits of protected religious exercise, and they should not be used to do so.

As both *Washington* and *Westchester Day School* (among many other examples)—read in contrast with the decision below—demonstrate, guidance is sorely needed.

b. The new Ninth Circuit "substantial burden" definition misunderstands the nature of religious activity and thus the nature of the protection embodied in RFRA, RLUIPA and State RFRAs.

A central aspect of the *en banc* majority's reasoning was that the interior "spiritual" experience of religion is not to be protected by RFRA. As the majority stated:

> Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual

> experience. That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden"—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion.

Pet. App. 6a, 7a. Such subjective religious experience, the court held, could not be "substantially burden[ed]" within the meaning of this Court's precedents because there was no threat of sanctions or conditioning of government benefits. *Id.*

To claim that the subjective experience of religious practice is unworthy of government concern is to entirely ignore the very nature of religious practice. Actions are religious precisely because of their subjective spiritual nature. Eating bread and drinking wine become the act of communion with Christ because of the spiritual convictions of the recipient. Sitting in silence waiting for the inspiration of the divine becomes "worship" to Quakers precisely because of their internal spiritual experience of the act. Eating or not eating certain foods at certain times is a religious act because of the internal subjective

purpose that the believer has. This is true of virtually all actions done for a religious purpose. This is the essence of the "exercise" of religion.

As Friedrich Schleiermacher, the father of modern liberal theology, wrote:

> Religion is the outcome neither of the fear of death, nor of the fear of God. It answers a deep need in man. It is neither a metaphysic, nor a morality, but above all and essentially an intuition and a feeling. . . . Dogmas are not, properly speaking, part of religion: rather it is that they are derived from it. Religion is the miracle of direct relationship with the infinite; and dogmas are the reflection of this miracle.

FRIEDRICH SCHLEIERMACHER, ADDRESSES ON RELIGION (1799).

To suggest, as the *en banc* majority does, that the government is free to ignore the "subjective" spiritual nature of religious practice without any consideration of the interests of such religious practice is to set a dangerous precedent. Requiring religious claimants to demonstrate that an "objective" spiritual experience—whatever that might mean—was burdened will be to place finders of fact in an unenviable and constitutionally impermissible position: to become arbiters of religious truth. This is not permitted.

> The religious views espoused by respondents might seem incredible, if not preposterous, to

> most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

United States v. Ballard, 322 U.S. 78, 87 (1944).

IV. A Proper Application Of The Compelling Interest Test Would Meet The Congressional Purpose Of Protecting The Free Exercise Of Religion Without Overwhelming Governmental Activities.

RFRA, RLUIPA and the state RFRAs provide a mechanism for the balancing of the fundamental interest in free exercise of religion with other important governmental interests. Congress specifically found in RFRA that:

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; [and]
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a). This compelling interest test, which requires that the substantial burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest," *id.* § 2000bb-1(a), does not automatically mean that any religious exercise must be free of government interference. It provides a mechanism "for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a).

As Justice O'Connor wrote in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, citing extensive precedent:

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. . . . [W]e have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.

494 U.S. 872, 894-95 (1990) (O'Connor, J., concurring).

With respect to religious liberty questions, the application of this test has far more often than not resulted in findings that uphold governmental action. In an empirical study of the application of

the strict scrutiny standard from 1990 to 2003, the author found 73 final published decisions applying the test to religious liberty cases under the Free Exercise Clause, RFRA and RLUIPA. In 53 of those cases, the government action survived strict scrutiny and was upheld. Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 857-58 (2006). And when examining only statutory RFRA and RLUIPA cases the challenged laws were upheld at an even higher rate: 72%. *Id.* at 860.

The *en banc* majority's conclusion that to affirm a standard other than the sanction/benefit test would subject the government "to the personalized oversight of millions of citizens" and that "[e]ach citizen would hold an individual veto to prohibit the government action," Pet. App. 7a, is therefore unfounded. It does not comport with the realities of the application of the strict scrutiny test to religious liberty claims and there is no need to prevent legitimate claims of substantial (but not absolute) infringement of religious liberty from being reviewed under the strict scrutiny test.

CONCLUSION

Amici believe that this case has vital significance for the religious observance of all Americans. We therefore urge the Court to grant certiorari.

Respectfully submitted,

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Supreme Court of the United States

NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, MEDICINE WHEEL COALITION ON SACRED SITES IN NORTH AMERICA, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS OF CALIFORNIA, KEWEENAW BAY INDIAN COMMUNITY, AND PUEBLO OF SANTA ANA IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

The U.S. Forest Service has authorized a ski resort to begin spraying millions of gallons of recycled sewage water (in the form of artificial snow) onto the most sacred mountain of southwest Native American tribes – a site that is a wellspring of the tribes' spirituality and that serves an indispensible role in their religious practices and rituals. The tribes contend that this authorization violates the Religious Freedom Restoration Act ("RFRA"), under which the federal government may not "substantially burden" a person's exercise of religion unless its action is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1. A divided en banc panel of the Ninth Circuit rejected this claim at its threshold, holding that a "substantial burden" exists under RFRA "only when individuals are [1] forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or [2] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." Pet. App. 20a. Spraying sewage water onto the mountain would do neither of these particular things, notwithstanding the profound impact it would have on the tribes' spirituality and religious practices.

The question presented, over which there is widespread disagreement among the circuits, is:

QUESTION PRESENTED – Continued

Whether a governmental action cannot constitute a "substantial burden" under RFRA unless it forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or coerces them by threatening civil or criminal sanctions to act contrary to their religious beliefs.

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STATEMENT OF INTEREST[1]

The Religious Freedom Restoration Act ("RFRA") was enacted by Congress to provide a remedy to those whose religious practices are substantially burdened by governmental actions. RFRA provides that "Government shall not substantially burden a person's exercise of religion" unless the government's action "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Despite the clear intent of Congress, the *en banc* decision by the U.S. Court of Appeals for the Ninth Circuit has severely circumscribed the scope of RFRA to exclude many American Indian religious practices.

The National Congress of American Indians ("NCAI") is the oldest, largest and most representative American Indian and Alaskan Native organization in the United States, representing over 250 Indian nations, tribes and village governments. NCAI is dedicated to protecting the rights and improving the welfare of all indigenous peoples in the United States. NCAI has a keen interest in protecting American Indian and Alaska Native religious practices, and is particularly concerned with protecting sacred sites

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[1] No counsel for a party authored the brief in whole or part. No counsel for a party made a monetary contribution to the preparation or submission of the brief. The counsel of record for each party received timely notice of the intent of *amici curiae* to file this brief and written consent was granted by each party.

on public lands that are critical to American Indian religious practices.

The Medicine Wheel Coalition on Sacred Sites of North America is a coalition of eight Plains Indian tribes located in the states of Wyoming, Montana, South Dakota, Minnesota and Oklahoma. The Board of Directors is appointed by the member tribes. The purpose of the Coalition is to protect Native American Indian religious freedom, promote access to and protection of sacred land sites and advocate for repatriation of ancestral remains, burial items and sacred objects.

Confederated Salish and Kootenai Tribes of the Flathead Reservation, Confederated Tribes of the Umatilla Indian Reservation, Rumsey Indian Rancheria of Wintun Indians of California, the Keweenaw Bay Indian Community, and the Pueblo of Santa Ana are federally recognized Indian tribes who maintain a government-to-government relationship with the United States established under treaties, executive orders, statutes and other laws. These individual Indian tribes share a common interest in protecting sacred sites, including sacred sites located on public lands, within their aboriginal territories, in preserving the rights of their tribal members to freely exercise their religious practices within these sites, and ensuring the survival of tribal identity and culture for future generations.

Amici believe that a functional standard for meaningful accommodation of sacred sites on public

lands requires what scholar Vine Deloria, Jr. describes as "a willingness on the part of non-Indians and the courts to entertain different ideas about the nature of religion." Vine Deloria, Jr., *God is Red: A Native View of Religion* 271 (1994). When efforts at accommodation fail due to the current confusion in the federal circuits about the meaning of "substantial burden" under RFRA, *amici* fear that cases like this one will continue to arise in the public lands context.

Amici share an interest in asking this Court to step in and settle the debate – to articulate a standard that both works in practice and conforms with Congress' intentions in enacting RFRA. A functional, objective and straightforward standard will lessen the number of RFRA claims by clarifying for federal land managers and potential American Indian tribal litigants the permissible bounds of accommodation, without opening a Pandora's Box of specious claims. *Amici* are gravely concerned that federal land management decisions under the Ninth Circuit standard that do not fully take into account the impact on American Indian religious belief and practice will severely impact the spiritual lives of tribal members, now and in the future.

Additionally, by articulating a standard that assures meaningful accommodation of American Indian land-based religions, this Court will ensure that Congress' intent that RFRA provide a remedy at law for all religious practices substantially burdened by the government will be carried out. "America does

not need to violate the religions of her native peoples. There is room for and great value in cultural and religious diversity. We would all be poorer if these American Indian religions disappeared from the face of the Earth." 123 Cong. Rec. 519766-67 (December 15, 1977) (remarks of Senator Abourezk of South Dakota supporting passage of the American Indian Religious Freedom Act, Pub. L. 95-341, 92 Stat. 469, 470, 42 U.S.C. § 1996 (1978).

ARGUMENT

I. The Court Needs To Clarify The Meaning Of "Substantial Burden" And Eliminate The Confusion Created By The Federal Courts Of Appeals.

In the wake of the *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit in *Navajo Nation v. United States Forest Service*, which reversed a unanimous three-judge panel, American Indian tribes and federal land managers in nine federal circuits are struggling with an array of "substantial burden" standards. *See* Petition for Certiorari at 12-13; 23-24.[2] Petitioners correctly observe

[2] Federal land managers are responsible for areas that encompass lands in two different circuits, which would mean they would apply different standards on either side of a line drawn by the agency. For example, two Forest Service Regional Offices encompass lands both in the Ninth and Tenth Circuits.

(Continued on following page)

that several Indian reservation boundaries span federal circuit boundaries.[3] Beyond that, tribal *aboriginal* territories are much larger than reservation boundaries and Indian tribes generally have concerns about the management of sacred land areas and land forms throughout their aboriginal territories.

Many sacred sites with which Indian tribes and their members have deep religious connections go back hundreds or thousands of years and are located outside of their present-day reservation boundaries – but *within* their aboriginal territories. *Amici* have identified at least sixteen tribal groupings (that make up many more than sixteen federally-recognized tribes) that have aboriginal territories which are located in more than one federal circuit,[4] and twenty

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(Region 3 and Region 4), *see* U.S. Forest Service Regions, available at http://www.fs.fed.us/contactus/regions.html.

[3] In addition to the Navajo Nation and the Goshute Indian Tribe referenced in the Petition for Certiorari, the following tribes have reservations in more than one federal appellate circuit: Iowa Tribe of Kansas (10th Circuit) and Nebraska (8th Circuit); Pokagon Band of Potawatomi Indians in Michigan (6th Circuit) and Indiana (7th Circuit); and Sac and Fox Nation of Missouri in Kansas (10th Circuit) and Nebraska (8th Circuit). *See* Department of Interior, Bureau of Indian Affairs Notice, *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 72 Fed. Reg. 13648-01 (March 22, 2007).

[4] As established through a review of decisions by the Indian Claims Commission: The Mandan, Hidatsa and Arikara Nation (8th and 9th Circuits); Crow Tribe (9th and 10th Circuits); Shoshone (9th and 10th Circuits); Goshute (9th and 10th Circuits); Southern Paiute (9th and 10th Circuits); Navajo (9th

(Continued on following page)

tribal groupings that have aboriginal territories in more than one region of the United States Forest Service.[5]

The result is a hodge-podge of RFRA "substantial burden" standards across the federal circuits, the Forest Service administrative regions, Indian reservations and aboriginal territory boundaries. Federal land management decisions, in particular those decisions impacting religious practices, should be

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and 10th Circuits); Chiricahua Apache (9th and 10th Circuits); Mescalero Apache (5th and 10th Circuits); Kiowa, Comanche, Apache (5th and 10th Circuits); Cherokee (4th, 6th, and 11th Circuits); Osage (8th and 10th Circuits); Cheyenne and Arapaho, Northern Cheyenne, and Northern Arapaho (8th and 10th Circuits); Sioux (7th, 8th, 9th, 10th Circuits); Chippewa (6th, 7th, 8th Circuits); Potawatomi (6th and 7th Circuits); Sac and Fox (7th and 8th Circuits); Pawnee (8th and 10th Circuits). *See* U.S. Geological Survey, *Indian Land Areas Judicially Established*, available at http://education.usgs.gov/common/resources/mapcatalog/images/culture/indian_land_judicial_areas_11x15.pdf.

[5] Comparing Regional National Forest Boundaries to the map of *Indian Land Areas Judicially Established*, the following tribal groupings cross more than one U.S. Forest Service Region:

> Navajo – Regions 2, 3; Southern Paiute – Regions 3, 4, 5; Northern Paiute – Regions 4, 5, 6; Mescalero Apache – Regions 3, 8; Jicarilla Apache – Regions 2, 3; Kiowa, Comanche, Apache – Regions 2, 3, 8; Hualapai – Regions 3, 4; Yavapai – Regions 3, 4; Mohave – Regions 3, 4; Quechan – Regions 3, 4; Western Shoshone – Regions 4, 5; Washoe – Regions 4, 5; Nez Perc – Regions 1, 4, 6; Coeur d'Alene – Regions 1, 6; Kalispel – Regions 1, 6; Kootenai – Regions 1, 6; Crow – Regions 1, 2; Sioux – Regions 1, 2, 9; Chippewa – Regions 1, 9; Osage – Regions 2, 8, 9. http://www.fs.fed.us/contactus/regions.shtml.

based on a uniform national set of legal criteria – not a varied set of criteria dependent on the federal circuit in question. Federal law must strive to provide a consistent and uniform set of standards to guide federal agencies and the constituents they serve.

A. The Ninth Circuit's Restrictive Definition of "Substantial Burden" Excludes Many American Indian Religious Practices From The Protections of RFRA.

The RFRA standard adopted by the Ninth Circuit simply defies common sense – especially in the context of religious practices by American Indians. A decision to permit an action on public lands which interferes with traditional religious practices will usually not force American Indians to choose between engaging in those religious practices or face either government civil or criminal sanctions, or the withholding of a government benefit. The effect of the substantial burden standard adopted by the Ninth Circuit is to *exclude* many American Indian land-based religious practices from virtually all protection or consideration under RFRA.[6]

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[6] This standard has incorrectly been engrafted onto RFRA by the Ninth Circuit from the decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), decided in the context of the free exercise clause of the First Amendment, which speaks in terms of the "prohibition" on free exercise, and not on the less restrictive RFRA standard of substantial burdens on religious practice.

Congress did not intend this disequilibrium. At present in the Ninth Circuit, from a practical perspective, there is *no* burden on American Indian religious practices caused by incompatible uses which will satisfy the threshold "substantial burden" requirement under RFRA, which in turn triggers the compelling interest and least restrictive means test imposed by Congress following *Employment Division v. Smith,* 494 U.S. 872 (1990). Congress intended a fair balancing of respective religious and governmental interests. There is nothing in the plain language of RFRA which supports a contrary interpretation, an interpretation that, in effect, reads American Indian religions out of RFRA.

Federal land management decisions under the Ninth Circuit standard may no longer be required to meaningfully take into account the impact on American Indian religious belief and practice. Such decisions will severely impact the spiritual lives of tribal members, now and in the future. Where management decisions regarding recreation, tourism, natural resource development, and other potential uses result in the alteration or destruction of sacred sites, it becomes an intrusive invasion of American Indian religion and tribal identity. Thus, a single ill-informed decision by a federal land manager may severely erode or eliminate the ability of Native practitioners to engage in religious practices. Such a decision may also threaten the survival of an entire Indian tribe's traditional religion and spiritual identity.

B. The Ninth Circuit's Restrictive Definition of "Substantial Burden" Adversely Impacts The Accommodation of American Indian Religious Interests At The Federal Agency Level.

The cramped, narrow standard for "substantial burden" articulated by the Ninth Circuit in *Navajo Nation* also sends an unfortunate signal to federal land managers – factual evidence of burden on religious practices is no longer relevant in determining whether a substantial burden has occurred under RFRA. This signal will skew the administrative fact-finding and record-making responsibilities of land managers under federal laws such as the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.* (2005) Relationships between federal land managers, American Indian tribes and Native religious practitioners, which have been in a tenuous but improving state since the decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 452 (1988), will once again be eroded reverting in a renewed lack of trust and respect between the parties.

Prior to the Ninth Circuit's decision in *Navajo Nation,* the negotiations between federal land managers and American Indian tribes were conducted with RFRA and its requirements in mind. Within this framework, the vast majority of land-use conflicts have been resolved long before the need to file legal actions in court. The meaningful accommodation achieved at the Medicine Wheel National Historic Landmark in the Bighorn National Forest in

Wyoming provides a specific example of a workable solution between federal land managers and various tribes and American Indian religious practitioners who hold sacred the Medicine Wheel and Medicine Mountain. A 1996 Medicine Wheel/Medicine Mountain Historic Preservation Plan was prepared "to ensure the Medicine Wheel and Medicine Mountain are managed in a manner that protects the integrity of the site as a sacred site and a nationally important traditional cultural property." USDA Forest Service, Bighorn National Forest, Medicine Wheel/Medicine Mountain Historic Preservation Plan, § I (September 1996) *see* www.fs.fed.us/r2/bighorn/recreation/heritage/nativeamericans. These accommodations were mutually agreeable to the American Indian religious interests, to the Big Horn County Commissioners who were concerned about access to commodity, recreational, and tourist uses, and to the U.S. Forest Service charged with management of the area. *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241 (10th Cir. 2004).

Other success stories include the Devil's Tower National Monument (Wyoming) voluntary climbing ban in June of each year, *Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), and the Rainbow Bridge National Monument (Arizona) interpretative signage and road closures for American Indian sacred ceremonies. *Natural Arch and Bridge Society v. Alston*, 209 F.Supp.2d 1207 (D. Utah 2002), *aff'd* 98 Fed.Appx. 711 (10th Cir. 2004). These examples demonstrate that Justice O'Connor's

admonition in *Lyng*, *supra*, that the government should accommodate American Indian religious values and practices is working in myriad circumstances: "[N]othing in our opinion [in *Lyng*] should be read to encourage governmental insensitivity to the religious needs of any citizen" and "the Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." 485 U.S. at 453-54.

Under RFRA, Congress intended that tribes have access to the courts when, despite proposed agency accommodations, tribes and religious practitioners are able to produce evidence that there is still a substantial burden on religious practice. It is in these instances that RFRA requires that a balancing of religious and governmental interests occur, and that the governmental interests be required to be compelling and tailored to be the least restrictive on religious values and practices if they are to be upheld. The Ninth Circuit's newly restrictive definition of "substantial burden" has decidedly tipped this balance against accommodation at the federal agency level and upended the scales when the parties reach federal court. In essence, the Ninth Circuit has now said that RFRA no longer matters, taking away a powerful tool for Indian tribes and Native practitioners to persuade the government to be accommodating.

The Court should grant review to bring common sense and uniformity to this vital area of the law and provide federal land managers guidance in relation to

the protections afforded to all religious practitioners under RFRA.

II. The Record In This Case Dramatically Illustrates The Nature Of Native Religious Practices And Provides An Excellent Vehicle To Define "Substantial Burden."

The concept of sacred geography is a fundamental part of most religious traditions in the world, including Christianity, Judaism, Hinduism, Islam, Buddhism, and Shintoism:

> [Sacred] mountains have an important place in the symbolic geography of religious traditions the world over, although the ways in which the mountains are significant have differed. Some have been seen as cosmic mountains, central to an entire worldview; others have been distinguished as places of revelation and vision, as divine dwelling places, or even as geographical manifestations of the divine.

10 ENCYCLOPEDIA OF RELIGION 130-33 (1987). American Indian religious traditions of North America share this common and unifying trait.

The San Francisco Peaks hold attributes of all of these distinguishing characteristics for the Petitioner tribes in this case. Indeed, the Peaks are considered among the world's great sacred mountains, alongside Tepeyac, Mexico (Catholic), Mount Sinai, Egypt

(Judeo-Christian); Mount Kailash, Tibet (Hindu, Buddhist); Mount Nebo, Jordan (Christian); Mount Fuji, Japan (Ainu, Buddhist); and Uluru/Ayers Rock, Australia (Australian Aborigine), to name but a few.[7] For centuries, the Peaks have been the fulcrum for religious practices of Native Americans in the Southwest – the home of spiritual beings, the place of mythological events and an area of origination. Pet. Brf. at 3-5.

Prior to the arrival of European settlers, the San Francisco Peaks were the aboriginal homelands of indigenous peoples whose descendents are members of the petitioner tribes. The Peaks gained their sacred status by virtue of ancient narrative, similar to the story of the Garden of Eden, as the locus of creation filled with the presence of spirits and a place of ritual, ceremony and medicinal gathering over the centuries. For example, the San Francisco Peaks play an important role in the Holy Beings' creation of the Navajo people, their identity, lands, language, culture, and religious (spiritual/ceremonial) practices. The Peaks form part of the foundation for the Navajo Blessingway ceremonies – blessings for traditional and modern Navajo government leadership, planning and prosperity, as well as blessings for the mental, physical, and spiritual well-being of each Navajo person.

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[7] Sacred Destinations, http://www.sacred-destinations.com/sacred-sites/sacred-mountains.htm.

Intimate relationships between American Indians and their sacred sites such as the Peaks have developed since time immemorial.

Thus, it is not the "choice" of the petitioner tribes and Native religious leaders that the Peaks are a holy place in their aboriginal territory. The treaties, executive orders, and other acts of Congress that rendered the San Francisco Peaks part of the public domain did not diminish the import of these sacred lands to the tribes and individual Native practitioners. *See, e.g.*, Treaty with the Navajo of September 9, 1849, 9 Stat. 974 (1849); Treaty with the Navajo of June 1, 1868, 15 Stat. 667 (1868). Petitioners cannot simply pack up their religious association with the Peaks and go elsewhere to worship; it is not within their power to do so.

The Native stories and songs which surround the Peaks as a sacred place find parallels in many religions. For example, the religious pilgrimages to Lourdes, France, are founded on the eighteen apparitions of the Blessed Virgin to a poor, fourteen-year-old girl, Bernadette Soubiroux. As the story is told, she fell into an ecstasy when the apparitions occurred in the hollow of the rock named Massabielle. Seeing these visions and hearing the voice of the Blessed Virgin, Soubiroux drank from a mysterious fountain in the grotto itself, the existence of which was unknown, but which immediately gushed forth. In 1862, her visions were declared real by the Catholic Church and a basilica was built upon the rock and

the great "national" French Catholic pilgrimages were inaugurated.[8]

Another example is Mount Sinai where the God of the Judeo-Christian tradition first spoke to Moses of his intention to liberate the Israelites:

> And the angel of the LORD appeared unto him in a flame of fire out of the midst of a bush: and he looked, and, behold, the bush burned with fire, and the bush was not consumed. And Moses said, I will now turn aside, and see this great sight, why the bush is not burnt. And when the LORD saw that he turned aside to see, God called unto him out of the midst of the bush, and said, Moses, Moses. And he said Here am I. And he said, Draw not nigh hither: put off thy shoes from off thy feet, for the place whereon thou standest is holy ground.

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[8] LASSERRE, Notre-Dame de Lourdes; BOISSARIE, L'oeuvre de Lourdes; BERTRIN, Histoire critique des événements de Lourdes, apparitions et guérisons (Paris, 1909), tr. GIBBS; IDEM, Un miracle d'aujourd'hui avec une radiographie (Paris, 1909), referenced in the New Advent, *Catholic Encyclopedia*, http://www.newadvent.org/cathen/09389b.htm. Millions of Catholics have made pilgrimages to Lourdes in the past century and more, and there are reported to be thousands of recorded spontaneous healings to have taken place there. *Id.* Another important sacred Catholic site in the western hemisphere is found in Mexico at Tepeyac, the hill of the Aztec Goddess Tonantzin, which became the very place of the apparition of Our Lady of Guadalupe. THE ENCYCLOPEDIA OF RELIGION, *supra*, at 133-34.

KING JAMES BIBLE, Exodus 3:2-5. Mount Sinai is now the revelatory center of the world for many religious adherents who ritually return each year to pray. Many Americans trace their ancestry to societies and religious traditions which evolved in the Eastern Hemisphere, and they still hold dear the sacred places of these religious traditions. Due to a lack of familiarity with the religious traditions of the first Americans, many in the dominant American society do not easily grasp the connection between public lands, sacred geography and American Indian theology.

Similar to Judeo-Christian beliefs about Mount Sinai, Navajo religious doctrine holds that the San Francisco Peaks is holy ground. Instead of a Navajo medicine man taking off his shoes as Moses was instructed, the medicine man must call the mountain by its sacred name, state the reasons for his presence on the mountain, and proceed according to prescriptions that have been in place since time immemorial. When the medicine man follows proper protocol, the Navajo "burning bush" (Holy Beings) will make its revelations to the medicine man. Navajo spiritual practitioners believe that if recycled sewer water (where the water's "soul" is no longer pure) is sprayed on the San Francisco Peaks, the Navajo "burning bush" will not "appear" any longer -- the religious rites will be ineffective because the medicine man will simply be "going through the motions."

During deliberations on the American Indian Religious Freedom Act, Pub. L. 95-341, 92 Stat. 469, 470, 42 U.S.C. § 1996 (1978) ("AIRFA"), Congressman Morris Udall of Arizona, AIRFA's chief architect in the

House of Representatives, eloquently framed the need for this Court to realize the analogous nature of Indian sacred sites to western religious sites:

> It is stating the obvious to say that this country was the Indians long before it was ours. For many tribes, the land is filled with physical sites of religious and sacred significance to them. *Can we not understand that*? Our religions have their Jerusalems, Mount Calvarys, Vaticans, and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody wars have been fought because of these religious sites.

124 Cong. Rec. H6842 (July 17, 1978) (emphasis added). If Mount Calvary, the Holy Mosque in Mecca, or the Wailing Wall were located on public lands in the United States, would they be denied protection under RFRA in the same manner as the San Francisco Peaks? Certainly Congress and the Court would act to protect these holy sites, to ensure that Christians, Jews, Muslims, Hindus, Buddhists and other religious practitioners could meaningfully pray and observe their rituals without interference by the federal government! Petitioners and *amici* are simply seeking equitable treatment for their religions and similar protection for their sacred sites alongside the world's other great religions.

American Indian religions generally exhibit an inseparability from and dynamism with the land and its sacred features. Mainstream religions in the United States, with many of their sacred sites on the other side of the globe, can locate churches and other

places of worship wherever they have the means to acquire real estate.[9] "[W]hile a Christian can practice that religion in many churches around the country, many Indian religious ceremonies can only take place in one particular geographical location." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.03[2](c)(ii)(B) (2005). Thus, oftentimes there is disconnect in the law's treatment of mainstream religious practices and the coterminous nature of American Indian religion, culture and the land.

Sacred places such as the Peaks also have a direct nexus with tribal identity. As Congress recognized in AIRFA, "the religious practices of the American Indian . . . are an integral part of their culture, tradition and heritage, because such practices form

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[9] The Church of Latter Day Saints of the United States has sacred places in the United States such as the Mormon Tabernacle in Salt Lake City, Utah, Martin's Cove in Natrona County, Wyoming, and Cumorah Hill in Manchester, New York. In Latter Day Saint theology, the "Golden Plates" are a set of bound and engraved metal plates from which Joseph Smith, Jr. said he translated the Book of Mormon. According to Smith, he discovered the plates on September 22, 1823 on Cumorah Hill. To this day Cumorah Hill remains one of the Church's most sacred places. To the Mormon Church's advantage, both Cumorah Hill and the Tabernacle are located on lands owned by the Church. *See* Hill Cumorah Visitor Center, http://www.hillcumorah.org; The Church of Jesus Christ of Latter Day Saints, http://www.mormon.org. Religious properties on private lands are subject to the protection of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc (2004). American Indian sacred lands located on reservations are likewise subject to the protections of tribal law and custom.

the basis of Indian identity and value systems." Pub. L. No. 95-341, 108 Stat. 3125. Where sacred geography may constitute the locus of creation of a people, the home of the spirits that protect those people, or the sole location at which crucial religious ceremonies may be performed or medicines gathered, the integrity of those sites directly sustains the identity of the tribes and the people who hold them sacred: "[S]ince the unique identity of the different Indian tribes is so often coherent with the land that animates and sustains their religious beliefs and practices, bureaucratic decisions to alter land sites are intrusive invasions of tribal self-understanding; the dissipation of tribal identity is the inherent consequence of land desecration." Brian Edward Brown, *Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land* 6-7 (1999). [10]

Substantially altering the physical integrity of a sacred site compromises its spiritual integrity, which

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[10] *Also see* Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L. J. 483, 510 (1999) ("The culture and religion must be passed down through the generations or the culture and religion cannot survive . . . The survival of indigenous cultures and religions requires . . . some individuals to act out of responsibility to their cultures, their peoples. If some people do not accept responsibility for carrying on the culture and religion, others will not have the freedom to choose the tribal religion because it will no longer exist.").

in turn may injure the integrity of a people, their religion, and their culture. If the physical alteration of a sacred place prevents practitioners from carrying out ceremonial practices at that place, they will not be able to pass on those ceremonial practices to the next generation, and those ceremonial practices will be lost. The burden on religion is borne not just by the present generation, but also by future generations who will not even have the opportunity to learn the rituals and pass them on.

The Historical Overview section of the AIRFA Report (August 1979), produced by the Federal Agencies Task Force, as mandated by Section 2 of AIRFA, provides an excellent historic framework within which to understand petitioners' intimate religious connection to the Peaks:

> These [American Indian] religions have the ability and propensity to experience new revelations and each new ceremony which is received by the religious community is given for a specific purpose and must be performed at the place and in the manner, and wherever the original revelation demands, at the time designated. American Indian tribal religions, in many instances, have acknowledged that the present ceremonies, given to them at the beginning of this world, must be performed continuously or great harm and destruction will come to the people.

AIRFA Report at 10-11. *See also* Deward E. Walker Jr., *Protection of American Indian Sacred Geography*,

HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 100 (1991).

The record in this case dramatically illustrates the nature and importance to many American Indian tribes of sacred sites inextricably bound to the land. Moreover, it is crucial that an appropriate standard under RFRA be articulated that balances the interests of the federal government and those of Native religious practitioners. This case provides the Court with that timely opportunity.

III. The Government May Not Invoke Slippery-Slope Concerns To Justify Its Actions Under The Religious Freedom Restoration Act.

The Ninth Circuit justifies its cramped, narrow view of the "substantial burden" standard based on its concern that

> otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.

Pet. App. 7a.

This complaint is based upon an erroneous belief that American Indian religious practitioners would be able to go onto federal lands and selectively prohibit particular land uses by identifying an area as religiously significant. However, a unanimous Court in the *O'Centro* case instructed that the United States cannot rely on any parade of horribles argument to justify its actions in the RFRA context:

> [T]he Government's argument for uniformity here is different; it rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to RFRA claims for an exception to generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability." 42 U.S.C. § 2000bb-1(a). Congress determined that the legislated test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." § 2000bb(a)(5).

Gonzales v. O'Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 435-36 (2006).

Inflated, speculative assertions that American Indian religious servitudes will foreclose important, but competing uses of the federal public lands, such as timber harvesting, mining, oil and gas exploration

and development, grazing, and other uses are belied by actual on-the-ground experience. Indeed, the record in this case makes clear all of the existing recreational uses of the San Francisco Peaks, including skiing, would continue without artificial snowmaking. Indian tribes and the federal government have every incentive to negotiate reasonable accommodations given the uncertainty, difficulty and expense of pursuing litigation under RFRA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* RELIGIOUS LIBERTY LAW SCHOLARS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE* [1]

Religious liberty law scholars Thomas C. Berg, Alan E. Brownstein, Kristen A. Carpenter, Perry Dane, Carl H. Esbeck, Richard W. Garnett, José Roberto Juárez, Jr., Kenneth L. Karst, Michael J. Perry, and Steven D. Smith submit this brief as *amici curiae* in support of the petition for a writ of certiorari in this case. *Amici* have studied and written extensively about the exercise of religion under the law in the United States, with particular attention to religious liberty under the religion clauses of the First Amendment and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc-1 *et seq.* Specifically,

Thomas C. Berg is the St. Ives Professor of Law at the University of St. Thomas School of Law and the Co-Director of the Murphy Institute for Catholic Thought, Law, and Public Policy. He is the author of RELIGION AND THE CONSTITUTION (2d ed. 2006) (with Michael W. McConnell and John H. Garvey) and *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994).

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1. Counsel of record for all parties received notice of *amici*'s intention to file this brief at least 10 days prior to filing, and the parties' written consent to the submission of this brief has been filed with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

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REASON FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S INTERPRETATION OF "SUBSTANTIAL BURDEN" EXACERBATES THE FAILURE OF THE FEDERAL CIRCUIT COURTS TO REALIZE CONGRESS'S INTENT IN ADOPTING RFRA AND RLUIPA.

I. Congress Enacted RFRA and RLUIPA to Ensure That Courts Broadly Require the Government to Justify Burdens on Religious Exercise.

In its watershed decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that the Constitution does not require the government to offer a compelling interest for the burden placed on a religious practice by a generally applicable criminal law. Two individuals who had been fired from their jobs for ingesting peyote for sacramental purposes were denied unemployment benefits by the State of Oregon on the ground that the consumption of peyote was prohibited under generally applicable criminal law. This Court refused to require the State to show a compelling governmental interest for applying the general criminal prohibition to those who used peyote for religious purposes, and upheld both the state law and the denial of benefits. *Id.* at 883-90. At the same time, the Court made it clear that legislative accommodations of religion, including exemptions from generally applicable laws, are consistent with our traditions and with the First Amendment. *Id.* at 890.

Finding that this Court had "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," Congress responded to *Smith* by enacting RFRA. 42 U.S.C. § 2000bb(a)(4). It "restore[d] the compelling interest test," *id.* § 2000bb(b)(2), because "governments should not substantially burden religious exercise without compelling justification," *id.* § 2000bb(a)(3). *See also* S. Rep. No. 103-111, at 2, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900 (1993) (*hereinafter S. Rep.*) ("[RFRA] responds to the Supreme Court's decision in [*Smith*] by creating a statutory prohibition against government action substantially burdening the exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the action is the least restrictive means of furthering a compelling government interest.").

Thus, RFRA's purpose was to implement Congress's desire that courts would require the government to justify "substantial burdens" on religious exercise. Although Congress left to the courts the task of balancing religious liberties against the government's "compelling" justification, it made clear in the statute that RFRA was to "guarantee . . . application [of the test] in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Indeed, when this Court invalidated the statute as applied to the states, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress responded by enacting RLUIPA to reimpose the restrictions of RFRA on state and local prisons and state and municipal land-use regulations. *See Cutter v. Wilkinson*, 544 U.S. 709, 717

(2005) (noting that in enacting RLUIPA "Congress carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard"). The legislative history of RFRA reflects that Congress had been particularly concerned about government interference with religious exercise in prisons and in the land use context. *See S. Rep.* at 8-10.

In sum, because "all Americans are free to follow their faiths free from governmental interference," *S. Rep.* at 8 (1993), Congress created in RFRA (and later RLUIPA[2]) a broadly applicable "claim and defense" so that courts, unlike in *Smith*, would at a minimum require the government to justify any substantial interference. 42 U.S.C. § 2000bb(b)(3). What constitutes such substantial interference, however, is understandably a difficult threshold question. And as a result, despite Congress's clear desire that courts broadly require the government at least to explain an intrusion on religious exercise, the federal appellate courts have failed to do so consistently, as described below. The Ninth Circuit has now exacerbated that circuit split by adopting the narrowest interpretation of "substantial burden"—one that may very well exempt from scrutiny under RFRA and RLUIPA the types of government action expressly contemplated by Congress

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2. That Congress intended RFRA and RLUIPA to be similarly interpreted is further evidenced by its harmonization of the definitions of "religious exercise" in the two statutes. *See* Pub. L. 106-274, § 7(a)(3), 114 Stat. 803, 807 (2000) (amending the definition in RFRA, 42 U.S.C. § 2000bb-2(4), to track that in RLUIPA, 42 U.S.C. § 2000cc-5, so as to cover the exercise of religion "whether or not compelled by, or central to, a system of religious belief").

in enacting the statutes. This Court should seize this opportunity to resolve the confusion surrounding the statutes and enforce the "substantial burden" test as Congress intended.

II. The Federal Circuits Have Been Inconsistent and Restrictive in Requiring the Government, Under RFRA and RLUIPA, to Justify Burdens on Religious Exercise.

As the Petitioners explain, the circuit courts have adopted a wide range of views on the threshold question of "substantial burden." Pet. 12-20. On one end of the spectrum, the Fourth and D.C. Circuits take a narrow view of "substantial burden" and thus significantly limit the circumstances under which the government must offer a justification for its interference with religious practice. The Fourth Circuit, for instance, has required that claimants under RFRA have "been compelled to engage in conduct proscribed by their religious beliefs, [or] have . . . been forced to abstain from . . . action which their religion mandates that they take." *Goodall* v. *Stafford County School Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996); *see also Henderson* v. *Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001), *cert. denied sub nom. Henderson v. Mainella*, 535 U.S. 986 (2002) (same) (citing *Goodall*).

In contrast, the Tenth and Eighth Circuits have taken a much broader approach to "substantial burden." *See Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 2005), *cert. denied*, 515 U.S. 1166 (1995); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1997), *vacated on other grounds sub nom. Christians v. Evangelical Free*

Church, 521 U.S. 1114 (1997) (citing *Werner*). Notably, as the Eighth Circuit has explained, their standard does not look to whether individuals "can continue" to engage in a religious practice, but merely to whether the governmental action in question "meaningfully curtails . . . a religious practice of more than minimal significance in a way that is not merely incidental." *Young*, 82 F.3d at 1418-19.

Between these two views of "substantial burden" lie four other circuits that have adopted various intermediate positions. The Seventh Circuit, for example, has held that "a regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004); *see also Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005); *Washington v. Klem*, 497 F.3d 272, 280 n.7 (3d Cir. 2007); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005).

Although the question of "substantial burden" is admittedly challenging, the federal appellate courts have failed to realize Congress's intent in enacting RFRA and RLUIPA. Congress acted precisely to counter the reluctance of federal courts to scrutinize government action, not to create a further lack of clarity over whether and when they should do so. As the legislative history indicates, RFRA was to "establish *one standard* for testing claims of Government infringement on religious practices." *S. Rep.* at 8 (emphasis added).

III. The Ninth Circuit's Decision Exacerbates the Failure of the Federal Circuit Courts to Realize Congress's Intent.

The Ninth Circuit has adopted the narrowest interpretation of "substantial burden." It holds that "a 'substantial burden' is imposed *only* when individuals are [1] forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or [2] coerced to act contrary to their religious beliefs by threat of criminal or civil sanctions." Pet. App. 20a (emphasis added). This definition resembles the narrow view of the Fourth and D.C. Circuits and is, by the Ninth Circuit's own admission, more limiting than the plain meaning of the phrase contemplates. *Id.* at 29a-30a.

The Ninth Circuit's decision exacerbates the existing failure of the federal appellate courts to realize Congress's intent in enacting RFRA and RLUIPA. It adds another voice to those courts most significantly out of line with Congress's desire to counter the reluctance of federal courts to scrutinize government action. Indeed, as discussed below, the Ninth Circuit's definition of "substantial burden" could exclude from the scope of RFRA and RLUIPA many of the circumstances expressly contemplated by Congress in enacting the statutes, as well as a number of situations in which the government should be required at least to justify its actions.

Importantly, *amici* reflect a range of views on the proper scope of constitutional protection of free exercise and the merits of *Smith*. But the question here is that of Congress's intent and of the relevant statutory text

in enacting RFRA and RLUIPA, and it is clear that the Ninth Circuit's decision so further distorts the landscape that action by this Court is needed. It is time for this Court to step in, as it did recently in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006), and ensure that Congress's clear intent is realized.

A. The Ninth Circuit's Definition of "Substantial Burden" Could Exclude Cases Plainly Contemplated by Congress in Enacting RFRA and RLUIPA.

Many of the very situations that Congress intended to include within the statutes' reach may not meet the Ninth Circuit's definition of "substantial burden." These instances of governmental interference with religious practice are not likely to (1) force individuals to choose between following the tenets of their religion and receiving a governmental benefit, or (2) coerce individuals to act contrary to their religious beliefs by threat of criminal or civil sanctions.

1. *Religious Objections to Autopsies.* In some faith traditions, the performance of an autopsy violates the sanctity of the body. For example, "[t]he Hmong believe that if an autopsy is performed, the spirit of the deceased will never be free." Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. Rev. 221, 226 (1993).

In enacting RFRA, Congress noted that, after *Smith*, courts were regularly rejecting religious objections to the performance of autopsies. *See S. Rep.*

at 8 ("Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction. . . . Jews have been subjected to autopsies in violation of their families' faith."); *see also, e.g.*, *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990); *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990). It stands to reason that Congress intended for government-mandated autopsies to constitute a "substantial burden" on religious practices under RFRA.

Individuals with religious objections to government-mandated autopsies, however, likely would not satisfy the Ninth Circuit's definition of "substantial burden." An autopsy is frequently a matter of "bureaucratic inflexibility," Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. at 226, required without the slightest thought to a decedent's religious sensibilities. *See, e.g.*, *Yang v. Sturner*, 728 F. Supp. 845, 846-847 (D.R.I. 1990) (describing state law providing for autopsies), *withdrawn by Yang*, 750 F. Supp. 558. Accordingly, submission to the state's decision to perform an autopsy is not a contingency upon which a governmental benefit is conditioned. The decedent's family will not receive a benefit for permitting the autopsy. Moreover, the government is not likely to coerce the decedent's family to permit an autopsy by threat of criminal or civil penalty. In all probability, it will simply reject any objection and perform the autopsy.

2. *Customs Seizure of Substances Used in Religious Ceremonies.* As this Court recently emphasized, "the very reason Congress enacted RFRA was to respond to [the] decision [in *Smith*] denying a claimed right to sacramental use of a controlled

substance." *O Centro*, 546 U.S. at 421. And consistent with this understanding of Congress's intent, this Court found against the government under RFRA in a case involving the seizure of *hoasca* tea from members of a Christian Spiritist sect that used the tea in sacramental services.

Under the Ninth Circuit's view of "substantial burden," however, the government could evade RFRA if it seized substances used in sacramental services without any threat of penalty, such as by customs seizure at the border. In those circumstances, the government would not have offered a choice between following the tenets of one's religion and the receipt of a governmental benefit; the customs agent would simply confiscate the goods and not provide any choice whatsoever. Nor would the affected individuals have been coerced by a threat of prosecution or civil penalty to act contrary to their religious practices. If the government simply seized a substance, the owner of the substance would not have been "coerced" to act in any way, much less in a way *contrary* to his or her religious beliefs.

3. *Religious Freedom in Prisons.* In enacting RFRA and RLUIPA, Congress was also highly cognizant of the need to protect the religious freedom of prisoners. RLUIPA, of course, was enacted specifically to reimpose the restrictions of RFRA on state and local prisons. In addition, the legislative history of RFRA refers specifically to several situations involving the religious liberty of prisoners. For example, a principal supporter of RFRA noted that the statute would allow for balancing a prisoner's "religious dietary needs" against the valid concerns of prison officials. 139 Cong. Rec.

26,407 (1993) (statement of Sen. Lieberman). And the Senate Report cites to *Cruz v. Beto*, 405 U.S. 319 (1972), a pre-Smith Supreme Court case in which this Court held that the denial of a Buddhist prisoner's right to use the prison chapel constituted a violation of the Free Exercise Clause. *See S. Rep.* at 9-10 nn. 21 & 22.

Congress's focus on prisoners' religious rights stems from the high likelihood that prison regulations will interfere with religious liberties. *See* 146 Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sen. Hatch & Sen. Kennedy) ("Institutional residents' right to practice their faith is at the mercy of those running the institution, and their experience is very mixed."). Over the years, detention officials have flushed copies of the Qu'ran down the toilet, *see Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), *rev'd*, 555 U.S. ___, 2008 WL 3910997 (2008), banned religious jewelry, such as crucifixes, *see Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), confiscated religious instruments, *see Brock v. Carroll*, 107 F.3d 241 (4th Cir. 1997), and forcibly imposed grooming standards, such as cutting the beard and sidelocks of a Hasidic Jew, *see Flagner v. Wilkinson*, 241 F.3d 475 (6th Cir. 2001).

Again, the Ninth Circuit's new interpretation of "substantial burden" would likely exclude many of these very circumstances that Congress intended to be covered by RFRA and RLUIPA. In most circumstances, prison regulations do not present a religious inmate with the choice between fidelity to his religious convictions and a governmental benefit, nor is a prisoner usually coerced to act *contrary* to his religious beliefs under threat of a civil or criminal penalty. Rather, the inmate

is simply denied the right to practice his faith because the guards have confiscated his religious materials, denied him a special meal,[3] physically prevented him from worshipping in the prison chapel, or otherwise forcibly acted against or upon him.

4. *Restrictions on the Use of Land by Religious Groups.* It is also clear that Congress intended RFRA and RLUIPA to cover governmental interference with the use of land by religious organizations. The legislative history of RFRA specifically discusses the denial of zoning permits to construct churches in "commercial areas." *See S. Rep.* at 8. And as discussed above, RLUIPA was enacted precisely to reinstitute the restrictions of RFRA on state and municipal land-use regulations.

The problem with such denials is that they can effectively block a congregation from building a house of worship at all. As one commentator has explained,

> A right to locate a church in built-up residential neighborhoods is illusory for all but the tiniest congregations. Unless your congregation can meet in a single house, the only way to build a church in a residential area is to buy several adjacent lots and tear down the houses. But several adjacent lots never

3. Although the *en banc* majority asserted that the denial of a special meal would constitute a "substantial burden" under its definition, it is clear from the dissenting opinion that reasonable minds—and judges—can disagree on that point. *Compare* Pet. App. 37a-38a n.24 (*en banc* majority), *with id.* at 70a (*en banc* dissent).

> come on the market at the same time, and if they did, any church pursuing this strategy would likely provoke an angry reaction from the neighborhood. It is only in commercial zones that significant tracts of land are bought and sold with any frequency. This makes sense of the common zoning code provisions that permit churches only in residential neighborhoods. To exclude new churches from commercial zones goes far to exclude them from the city, while allowing them to locate as of right in residential neighborhoods goes far to fool uninformed judges into believing that a complaining church has ample opportunity to locate.

Douglas Laycock, *State RFRAs and Land Use Regulations*, 32 U.C. DAVIS L. REV. 755, 760-61 (1999) (footnotes omitted).

Indeed, the area of land use by religious organizations is particularly susceptible to governmental interference. For instance, New York City officials once blocked a church's efforts to replace its own building because the structure had been designated a landmark. *See* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725, 732 (1999) (citing *Rector, Wardens & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 351-52 (2d Cir. 1990)). And a city's zoning policy once limited churches from providing hospitality and food to the homeless. *See Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225, 1237-40 (E.D. Va. 1996).

Under the Ninth Circuit's "substantial burden" standard, however, these burdens on religious practice might not suffice to state a cognizable claim under RFRA or RLUIPA. Neither the denial of a zoning permit nor a government prohibition on certain land uses compels a choice between adherence to religious principles and the receipt of a government benefit. In such situations, the church or religious organization would not be presented with *any* choice. Furthermore, the church or religious organization would not be coerced to act contrary to its religious tenets by a threat of civil or criminal penalties. It is not clear that there would be any threats at all and, to the extent that they would be threatened by penalties, in none of these circumstances would the churches or religious organizations be coerced to act *contrary* to their religious tenets.

B. Under the Ninth Circuit's Definition of "Substantial Burden," the Government Could Escape Scrutiny in a Number of Troubling Cases.

Beyond the cases specifically contemplated by Congress, the Ninth Circuit's view of "substantial burden" could also exclude a number of situations in which the government should be required at a minimum to provide an explanation for its actions.

1. *Compelled Medical Treatment.* Religious beliefs concerning the treatment of the body are often amongst the most important of religious tenets and can frequently come into conflict with standard medical treatments. Courts have encountered situations where children or incapacitated adults have been given blood transfusions

or vaccines despite religious proscription. *See, e.g., John F. Kennedy Mem'l Hosp. v. Heston*, 279 A.2d 670 (N.J. 1971), *overruled by In re Conroy*, 486 A.2d 1209 (N.J. 1985) (upholding hospital's actions where an unconscious Jehovah's Witness was provided a blood transfusion notwithstanding her wearing a card indicating that as a matter of religious principle she did not want to receive blood transfusions).

While there may be a compelling governmental justification for these actions, the Ninth Circuit view of "substantial burden" would never require the government to offer such a justification. Neither the individual subjected to the medical treatment nor the individual's family would be presented with a choice between his or their religious tenets and a governmental benefit. In cases of compelled medical treatment, no choice would be provided. Moreover, the government would not be coercing the individual to act contrary to his religious beliefs on a threat of civil or criminal penalty, as there would be no threatened penalty.

2. *Certain Government Intrusions into Places and Means of Worship.* In some circumstances, by intruding into the places and means of worship, the government can significantly hamper an individual's ability to practice his religion. For example, the Ninth Circuit has previously found it to be a "substantial burden" under RFRA when prison officials tape a Catholic priest's performance of the Sacrament of Penance with a prison inmate. *See Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997), *overruled on other grounds by City of Boerne*, 521 U.S. 507. Similarly, if the government were to enter the temples of the Church of Jesus Christ of Latter-day Saints—which are open only to members of the church who comply with particular

teachings, see Immo Luschin, *Latter-day Saint Temple Worship and Activity*, in ENCYCLOPEDIA OF MORMONISM 1449 (Daniel H. Ludlow ed., 1992)—it would likely chill and burden the practice of the Mormon faith.

Again, while there may be a compelling governmental justification for these types of intrusions, the Government would never need to demonstrate any justification under the Ninth Circuit's view of "substantial burden." Such intrusions hardly force an individual to choose between his religious tenets and a governmental benefit, nor does the intrusion coerce the individual to act contrary to his religious beliefs on a threat of civil or criminal penalty. When the government intrudes into places or means of worship, it simply imposes that intrusion upon the worshipers. Tellingly, the *en banc* majority sidestepped the question whether such intrusions would come within its definition of "substantial burden" by refusing to grapple with its previous opinion in *Mockaitis*. *See* Pet. App. 28a-29a n.15.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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